Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

BRADLEY J. DONAHUE, PETITIONER

v.

CITY OF BOSTON, THE BOSTON POLICE DEPARTMENT, AND PAUL F. EVANS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE BOSTON POLICE DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Brief Introduction to Set the Scene so that Questions may be Understood (Pursuant to United States Supreme Court Memo to those Intending to Prepare a Petition)

This Petition arises from a 2003 decision of the First Circuit relating to a 31 year old Consent Decree that controls the hiring of Boston police officers. The plaintiffs of 31 years ago are long gone, and, paradoxically, the original 1973 defendant, the City of Boston, is now the proponent of race conscious hiring, relying upon the old Consent Decree to validate its actions. The Petitioner challenged the constitutionality of the Consent Decree in 2000 after he was denied an appointment to the police department even though he scored 96 on the qualifying exam in 1999, and would have been hired if he were Black or Hispanic. Petitioner took the next exam in 2001, and scored 100. Concurrently, the City of Boston, without notice to the Petitioner, implemented an age limitation statute prohibiting the hiring of certain candidates over age 32. Because Petitioner turned 32 just before the 2001 exam he was again denied the job. He moved to amend his Complaint to challenge the age limitation and its effect when combined with the Consent Decree, the District Court denied the Motion, and the Petitioner appealed. The First Circuit held (*Donahue I)* that Petitioner likely would have been hired if he were a minority and remanded the case back to the District Court, which then granted the Motion to Amend, without reservation. Subsequent to *Donahue I*, but before he amended his Complaint, Petitioner discovered that Defendants had taken retaliatory actions against him

because he had filed this case. Consistent with *Donahue I*, Petitioner amended to include Title VII and retaliation claims. The District Court ignored his Title VII claims and held that strict scrutiny standards did not apply. On appeal, the First Circuit held in *Donahue II* (Torruella, J., Lipez, J. and Lisi, J.) that Petitioner was required to and failed under Fed. R. Civ. P. 15(a) to seek specific approval to include Title VII claims, even though the District Court had granted the Motion to Amend without limitation. *Donahue II* retroactively disallowed amendment of the Complaint and refused to evaluate the age limitation in context of the Consent Decree or to apply strict scrutiny standards.

1. Is the denial of the right to amend a Complaint when justice so requires an abuse of discretion and thereby a denial of due process and equal protection under the Constitution of the United States?

2. Did the First Circuit inappropriately refuse to accept an amendment to a Complaint, thereby denying the Petitioner's rights of due process and equal protection under the Constitution, where the First Circuit held that the Petitioner did not seek specific permission to include counts under Title VII, even though the Petitioner did file a Motion to Amend, which was granted without reservation by the District Court, and timely filed his amendments pursuant to that order?

3. Where the Petitioner alleges continuing violations by the governmental actor and where the last of the alleged continuing violations was a

Title VII claim for retaliation related directly to the filing of the Complaint, does justice require that the Court allow the Complaint to be amended to include the Title VII violation allegation?

4. Where a Motion to Amend a complaint is granted without reservation, may the District Court or the First Circuit subsequently determine that despite the general granting of the motion to amend, specific permission was required for the Title VII count?

5. Where the United States District Court and the First Circuit have been supervising the continuous implementation of the 1973 Consent Decree, and where the First Circuit improperly relied on Fed. R. Civ. P. 15(a) to perpetuate the 1973 Consent Decree by stating that the Petitioner could not include Title VII Counts because he had failed to seek specific permission to do so, even though he had received permission to amend the Complaint, does that abuse of discretion, combined with the First Circuit's oversight of the 1973 Consent Decree, result in a violation by the First Circuit of the standards of strict scrutiny where the decision not to consider the Title VII amendments to the Complaint appears to be a pretext to avoid the Petitioner's challenge to the Consent Decree itself?

6. Whether the First Circuit erred in failing to hold that the presence of a racially conscious hiring policy under its 1973 Consent Decree (still in place, and supervised by the District Court and

the First Circuit) requires strict scrutiny analysis when the use of an age limitation statute applied in conjunction with the Court's 1973 Consent Decree results in a racially disparate impact on a particular racial group?

7. Where the Petitioner sought injunctive relief against the application of the court's 1973 Consent Decree against him, and where such injunctive relief was denied by the District Court, and where the First Circuit subsequently held that Petitioner was denied the opportunity to compete on equal footing based on his race, and where such ruling would require the granting of the injunctive relief sought by the Petitioner, and subsequently the governmental actor passed an age limitation statute which would never have applied to the Petitioner had the injunctive relief been appropriately and timely granted, then did the First Circuit Court err in *Donahue II* in holding that the Petitioner was not "able and ready" at the time of its decision, even though the Petitioner was able and ready when the injunctive relief was sought?

8. Whether the First Circuit Court and the United States District Court erred in disregarding the holdings of the United States Supreme Court regarding disparate impact on similarly situated persons, where Massachusetts General Laws Chapter 31 §58A (the age limitation statute) by definition, when first implemented, could only apply to white candidates who scored 96 or better on the qualifying exam and who turned 32

prior to next exam, since all minorities with a 96 score would have been hired?

9. Whether the United States District Court erred in failing to invalidate the Consent Decree established in *Castro v. Beecher*, 365 F. Supp. 655 (D. Mass. 1973)(Wyzanski, J.)?

PARTIES TO THE PROCEEDINGS

The Petitioner, Plaintiff below, is Bradley Donahue.

The Defendants below are: The City of Boston, The Boston Police Department, and Paul F. Evans, Individually and in his official capacity as Commissioner of the Boston Police Department.

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The Opinion of the First Circuit in *Donahue v. City of Boston* (Opinion No. 03-2227.01A) dated June 8, 2004 *(Donahue II)* is attached hereto at Appendix (App.) p. 1a. The Order of the District Court, dated June 4, 2003, is attached hereto at App. p. 21a and the Order of the District Court dated December 10, 2002, is attached hereto at App. p. 49a.

JURISDICTION

The judgment of the First Circuit Court of Appeals in *Donahue II* was entered on June 8, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves portions of the Fourteenth Amendment of the Constitution of the United States; 42 U.S.C. §§ 1983, 1988, Title VII 42 U.S.C §2000e-2(m) and § 2000e-5(g)(2)(B), M.G.L. c. 151B, M.G.L. c. 31 §58A, Federal Rules of Civil Procedure 15(a) and are attached hereto at App. p. 54a.

STATEMENT OF THE CASE

This is a case about the unjust denial of equal opportunity by the City of Boston as well as by the United States District Court (D. Mass.) and the First Circuit Court of Appeals, each of which seek to extend the application of a 1973 Consent Decree, which controls the hiring of Boston police officers based upon

race. The original plaintiffs in the Consent Decree no longer exist. The complaints of constitutional violations in 1973 no longer exist. The original defendant, the City of Boston, is now the proponent of the Consent Decree, since the City seeks to use race in its hiring of police. The District Court and the First Circuit, aware of the perversion of the original plaintiff and defendant roles under the Consent Decree, nevertheless have allowed the Consent Decree to continue, in effect ordering the City of Boston to do what it wants to do, *i.e.*, use race in hiring. It is this Consent Decree that Petitioner challenges.

For over 7 years, beginning when he was 26 years old, Petitioner has been seeking the opportunity to compete on equal footing for a position as a Boston city police officer, without his race being considered. On May 8, 1999, the Human Resources Department of the Commonwealth of Massachusetts ("HRD") administered a statewide Civil Service examination, on which the Petitioner scored a 96. He was not hired by the Boston Police Department, even though at least one lower scoring minority was hired. Petitioner filed his Complaint in this matter on May 9, 2000, asserting claims of discrimination and seeking injunctive relief, challenging the Court supervised 1973 Consent Decree requiring the use of race in the hiring of Boston police.

More than 15 months after the Petitioner filed his Complaint, on August 10, 2000, the Massachusetts legislature passed M.G.L. c. 31, §58A (hereafter "§58A"), an age limitation statute prohibiting hiring police and firefighters over age 32 unless they had already received an appointment. The City of Boston adopted these provisions in December 2000. On April 25, 2001, the City Council passed a Home Rule Petition to retroactively exempt from §58A those firefighter

candidates who passed the April 29, 2000 exam. On May 2, 2001, Mayor Menino approved the Home Rule Petition by signing it, one full year after the exam had been administered to the firefighter candidates, thus retroactively making such candidates eligible for hire despite the fact that they were over 32 years old when taking the exam.

Candidates for the April 2001 police exam, including Petitioner, received neither constructive nor actual notice of the acceptance by the Boston City Council of §58A. Petitioner took the next available exam in April 2001 and scored 100. He had just turned 32 years old. The website of the City of Boston never included any description of an age 32 limitation for police until after October 16, 2002, twenty-three months after the City passed the age 32 limitation statute, and eighteen months after Petitioner took the 2001 exam. If the Petitioner were a minority, he would have received an appointment to the police force before his 32nd birthday and before the passage of §58A.

On September 1, 2001, HRD prepared the initial eligibility list for applicants to the Boston Police Department based upon the results of the 2001 examination, as implemented and required by the race-conscious 1973 Consent Decree.[1] Upon discovering that his name was not on the list, despite his score of 100, Petitioner immediately moved to amend his Complaint to challenge the age limitation statute and its effect when combined with the 1973 Consent Decree. The District Court denied his Motion to Amend, granted summary judgment against him without a hearing, and the Petitioner appealed. The First Circuit held in

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[1] See *Castro v. Beecher*, 365 F. Supp. 655 (D. Mass. 1973)(Wyzanski, J.)

Donahue v. City of Boston, 304 F.3d 112 (1st Cir. 2002) *(Donahue I)* that, despite repeated denials of the City of Boston to the contrary, Petitioner likely would have been hired if he were a minority, since at least one lower scoring minority was hired solely on the basis of race, and remanded the case back to the District Court, stating that the issues relating the Motion to Amend were not moot. On remand, the District Court granted the Motion to Amend, without reservation, aware that the Petitioner intended to raise multiple new issues, and ordered that the Amended Complaint be filed in 21 days. In addition, the District Court ordered, *sua sponte*, that the Petitioner file a motion to certify numerous unspecified counts that may involve state law issues to the Supreme Judicial Court of Massachusetts (the "SJC"). Clearly, the District Court anticipated numerous new counts. After the First Circuit's decision in *Donahue I*, but before Petitioner amended the Complaint, Petitioner discovered that Defendants had taken retaliatory actions against him because he had filed this case.

On November 28, 2001, the Boston City Council unanimously passed a Home Rule Petition to exempt from §58A "any Boston resident who took and passed the April, 2001 civil service examination for appointment to the position of police officer with the Boston Police Department." This exemption applied to the Petitioner and would have resulted in his immediate hire. However, Mayor Menino would not approve the exemption from §58A for police officer candidates, as he had done for firefighters, because Petitioner had filed this litigation. Petitioner amended the Complaint, and incorporated a claim of retaliation and new counts under Title VI and simultaneously filed a claim with the Massachusetts Commission Against

Discrimination ("MCAD") pursuant to Title VII and M.G.L. ch. 151B. MCAD issued a "Letter to Sue" in which the MCAD deferred the matter to the United States District Court. Thereafter Petitioner sought summary judgment under his Fourteenth Amendment claims, Title VII and Ch. 151B. At every juncture, beginning with the original Complaint, and reiterated in successive pleadings, Petitioner requested prospective injunctive relief. Petitioner requested oral argument on cross motions for summary judgment, but was again denied a hearing. Petitioner also requested recusal of the District Court Judge under Local Rule 40.1(K)(2), but that request was also denied. The District Court held that strict scrutiny standards did not apply and granted summary judgment against the Petitioner, without reference to his Title VII claims. Petitioner again appealed to the First Circuit, which then held in *Donahue II* (Torruella, J., Lipez, J., Lisi, J.) that Petitioner was required under Fed. R. Civ. P. 15(a) to seek approval to include Title VII claims, even though the District Court had granted the Motion to Amend without reservation or limitation. The First Circuit refused to address the Title VII amendments, effectively disallowing the amendment of the Complaint as to the Title VII and retaliation claims, which were dispositive in Petitioner's favor, especially in light of the holding in *Donahue I* that the Petitioner likely would have been hired if he had been a minority.

Justice requires the amendments be allowed and considered. The Defendants were participating in ongoing and continuing use of a race based Consent Decree, and participating in retaliation against Petitioner for filing of this lawsuit. Petitioner complied with the 21 day filing deadline imposed by the District Court when it granted him broad leave to amend, and

timely filed his amendments. The allegations of retaliation were supported by the Affidavits of five individuals who were aware of the nature of the retaliation. In refusing to consider the Title VII amendments, purportedly because the permission sought to make them was not "specific", the First Circuit contorts the spirit of the Federal Rules that liberally allow amendments, and appears to exploit Fed. R. Civ. P. 15(a) improperly to protect its own 1973 Consent Decree from Petitioner's challenge. The First Circuit's reliance upon Fed. R. Civ. P. 15(a) (hereafter, "Rule 15(a)") to prohibit consideration of appropriate new claims results in the denial of Petitioner's rights of due process and equal protection under the Constitution.

In addition, the *Donahue II* Court refused to evaluate the §58A age limitation in the context of its 1973 Consent Decree, disregarding this Court's standard of strict scrutiny. The District Court and the First Circuit, both long time supporters of the 1973 Consent Decree, rejected Petitioner's claims entirely on a flawed analysis that Petitioner does not have standing to pursue prospective relief because he is not "able and ready" to apply for appointment to the Boston Police Department because he reached age 32 less than one month before taking the April 2001 civil service exam. The District Court and the First Circuit distorted the meaning of "able and ready" and ignored the fundamental and undisputed fact of this case: *that Petitioner would have been hired based on his 1999 exam score if he were a minority candidate*—without regard to the subsequent passage of §58A. The First Circuit ignored the fact that based on his race, and not his age, Petitioner was prevented from receiving a police appointment *prior* to the 2001 exam, as

acknowledged by the *Donahue I* Court in its remand. The First Circuit also ignored the undisputed fact that Petitioner brought his claims *both before he was 32 and before the age 32 hiring limit was passed* and, further, ignored the evidence that Petitioner had no notice of the passage of the age 32 limitation. The First Circuit did not even address the Petitioner's argument for the retroactive application of prospective injunctive relief—an essential element of Petitioner's claim given that §58A was passed and implemented *after* Petitioner's claims arose and *after* he took the 1999 exam. The First Circuit ignored Petitioner's numerous arguments and disputed facts regarding his Title VII and M.G.L ch. 151B claims and applicable legal standards there under that do not require Petitioner to prove he would have obtained a police appointment in order for relief to be granted.

REASONS FOR GRANTING THE PETITION

A. The First Circuit's Refusal to Consider the Petitioner's Title VII Amendments is an Abuse of Discretion and a Violation of Due Process and Equal Protection Under the Constitution

1. The Petitioner is Entitled to Include his Title VII Amendments in the Amended Complaint Because Justice So Requires.

On September 5, 2002, the First Circuit in *Donahue I* held that Petitioner had been exposed to unequal treatment because he was not able to compete

on an equal footing with other applicants to the Boston Police Department because of his race, stating:

> Notwithstanding the Appellees'[Boston Police Department's] various arguments to the contrary, we think it is plain that Donahue was denied the opportunity to compete on equal footing in the BPD's hiring process on account of his race. It is not disputed that at least one minority candidate – one with no statutory preference or language skills – was appointed to the Academy despite having scored lower than Donahue on the May 1999 exam. Such evidence makes the conclusion inescapable: Donahue would likely have been hired based on his May 1999 exam score if he were a minority applicant.

Bradley J. Donahue v. City of Boston, et al, 304 F. 3d. 112, 119-120 (1st Cir. 2002).

The fact that Petitioner would have been hired if he were a minority is the foundation for all of his constitutional, Title VII and M.G.L. c. 151B counts. Although the City of Boston repeatedly insisted that Petitioner would not have been hired if he were a minority, the First Circuit concluded in *Donahue I*, notwithstanding the City's denials, that at least one lower scoring minority was hired. After the decision in *Donahue I*, but before Petitioner amended the Complaint, Petitioner discovered that the Boston Mayor's office had taken retaliatory actions against the Petitioner solely because he filed the case. The affidavits of five individuals, which were submitted as

part of the Second Amended Complaint, prior to the summary judgment in *Donahue II*, establish that the Mayor, having already signed the §58A exemption for Fire Department candidates, stated that the §58A exemption for the Police Department candidates would not occur because that would guarantee that Petitioner would be hired. Upon discovering these facts, Petitioner added a retaliation claim to the Second Amended Complaint.

In *Donahue II*, the First Circuit inexplicably held that the Petitioner had failed to ask permission to include Title VII counts in the Second Amended Complaint. However, the record is unequivocally clear that on remand, the District Court had granted the Motion to Amend without reservation. Further, the record also shows that at a status conference prior to the District Court's granting the Motion to Amend, the District Court inquired as to the scope of the amendments. It did not seek, at that point, any exact description of every amendment. Having listened to an impromptu list of potential constitutional violations that would be added to the Second Amended Complaint, the District Court ordered the Petitioner to submit a Second Amended Complaint within 21 days. The Petitioner at that point did not know of the retaliation against him. In addition, the District Court ordered the Petitioner to move to certify questions of state constitutional law to the Massachusetts SJC. The District Court did not limit the number of matters to be certified to the SJC, nor did it limit the matters that could be added to the Second Amended Complaint. The District Court plainly anticipated the addition of new claims in the Second Amended Complaint. If the District Court intended to limit the Second Amended Complaint to the matters raised prior to *Donahue I*, it

would not have ordered a new Amended Complaint to be submitted within twenty-one days. Certainly, it never would have ordered the submission of a Motion to Certify Issues to the SJC if it expected no new matters would be added to the Second Amended Complaint.

Rule 15(a) states "Leave [to amend] shall be freely given when justice so requires". Justice requires amendment to the Complaint here not only because the added counts are related and were timely filed pursuant to order of the Court, but also because new incidents of use of the Consent Decree against Petitioner occurred. The Petitioner took and retook the exam three times and each time the 1973 Consent Decree was used against him. After the filing of the initial Complaint, new causes of action arose by definition because of the repetitive nature of retesting. Thus, the First Amended Complaint raised issues resulting from the application of the race-conscious Consent Decree as a result of Petitioner's second exam score (96). The Motion to Amend the First Amended Complaint (initially denied and then reversed in *Donahue I*) was appropriate because the Petitioner had taken the exam again. This is the essence of a continuing violation, and the fundamental nature of the application on a continuing basis of a race-conscious Consent Decree. To suggest that justice does not require liberal and freely given permission to amend the Complaint with each subsequent violation would mean that the Petitioner would be faced with the unbearable burden of filing separate lawsuits each time he took the qualifying exam. Since the exams were given approximately every two years, then he would have been required to file three separate lawsuits, or even as many as six separate lawsuits, since each exam

was used twice to pick two separate classes of police officers.

The *Donahue II* decision requiring separate permission for amendment of the Title VII counts suggests extraordinary bias and impropriety when viewed in the context that Petitioner has challenged a Consent Decree in which the District Court and the First Circuit have intimate involvement and long-term vested interests. It seems that the *Donahue II* panel of the First Circuit realized that the *Donahue I* holding opened the door to successful challenge to the 1973 Consent Decree absent some other means to cut off the Petitioner's claims, and therefore the panel concocted the constraint of separate and specific permission to amend Title VII claims. First, the *Donahue II* panel in effect retroactively denied the Petitioner's Motion to Amend by refusing to consider the Title VII amendments, thus eliminating Title VII standards, which if applied, would be dispositive in favor of the Petitioner. Second, *Donahue II* pretended that the Consent Decree has no actual racial outcome by limiting its analysis of prospective relief to one question: whether Petitioner "is able and ready to apply for a position with the BPD." This was essentially the only issue addressed by the District Court and First Circuit, and it is founded upon the faulty premise that since Petitioner was over age 32 when he took the 2001 exam he therefore was not "able and ready" to accept a job. The Court expediently disregarded the fact that Petitioner took the qualifying exam in *1999* and scored high enough *at that time* to have been hired if he were a minority. Thus, *it is the 1999 exam, and not the 2001 exam, which is relevant to determining whether Petitioner was able and ready to accept a job* with the Boston Police Department.

Petitioner filed his claims of unequal treatment both *before* he turned 32 and *before* the state enacted the age 32 limit for hiring police. The question here is not whether the §58A age limitation remains in effect, but whether it was in effect when Petitioner filed his claim for prospective relief. It was not, and therefore should not be applied retroactively to deny recovery of Petitioner's claims.

2. The First Circuit Has Improperly Denied the Title VII Amendments in Order to Avoid Review of Its No Longer Valid 1973 Consent Decree.

Donahue I stated that Petitioner need not prove he would have been hired to prevail under Title VII. Because *Donahue I* held that "at least one minority with a lower score than Donahue was hired," then the Title VII claim is necessarily proven pursuant to the "law of the case". Faced with these precedents, if the First Circuit had permitted the Title VII amendments it would have been forced to examine the constitutionality of its own 1973 Consent Decree. This is because the only authority for the use of race is the Consent Decree. But that Consent Decree necessarily must fail review under strict scrutiny. The First Circuit must know that its Consent Decree cannot withstand strict scrutiny review and for this reason it improperly relied on Rule 15(a), without regard for the requirements of justice, to ensure there would be no Title VII amendments and, more significantly, the attendant review of the Consent Decree.

This Court requires that strict scrutiny be applied to any governmental actor's use of racial classifications. *See Adarand Constructors v. Pena*, 515

U.S. 200 (1995). Strict scrutiny in turn requires a compelling governmental interest and narrow tailoring toward that interest. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505, 507-508 (1989). This Court has also stated that courts must be "most skeptical" of the use of race by any governmental actor. *See Bush v. Vera*, 116 S. Ct., 1941, 1961-56 (1996). Given the length if time (31 years) that the Consent Decree has been in place, combined with the absence of the original plaintiffs from the Consent Decree and the fact that the City itself, the original defendant, is now the proponent of the Decree, the Court must seriously examine why the District Court and the First Circuit are not "highly skeptical" of the continued application of the Consent Decree. Racial classifications are simply too pernicious to permit anything but the "most exact connection between the justification and the classification". *Adarand* at 213, *op. cit.*, quoting Stevens, J., dissenting in *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

Justice required the First Circuit to allow the motion to amend, as had the District Court, because: (a) Title VII issues involve alleged improper behavior by the governmental actor in repeatedly misrepresenting that the Petitioner would not have been hired if he were a minority; (b) the retaliation claim was part of an ongoing, continuing violation that commenced with the use of race under the Consent Decree and continued over two and a half years, ending with the retaliation;[2]

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[2] The statute of limitations for the filing of a civil action for damages or injunctive relief under M.G.L. ch. 151B is three years after the alleged unlawful practice occurred. The First Circuit in *Donahue I* has already held that the implementation of the Consent Decree to the 1999 exam occurred on March 5, 2001. *Donahue I* establishes that this is the date that Petitioner would have been appointed to the police department if he were a

and (c) Petitioner has exhausted administrative remedies and is entitled to make a claim under Title VII. Further, the *Donahue I* court specifically reviewed the applicability of Title VII, holding that Petitioner could obtain declaratory relief under its provisions stating it is unlawful for an employer to consider race as a motivating practice. Under Title VII, the Petitioner need not prove that but for his race he would have *obtained* the job in order to prevail and obtain declaratory relief; rather, Petitioner need only show that the Defendants utilized race in the decision-making process.[3] Because *Donahue I* states that it is *indisputable* that Petitioner would likely have been hired if he were a minority, it is dispositive of Petitioner's Title VII and C. 151B claims: but for his

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minority. Therefore, Petitioner was still well within the statute of limitations in 2001 for the use of race and all of the subsequent discriminatory acts set forth in the Second Amended Complaint, which was filed on December 30, 2002.

[3] In order to establish a *prima facie* case of discrimination by disparate treatment, a Petitioner must demonstrate (1) that he is a member of a protected class; (2) that he met the minimum qualifications for the position; (3) that he experienced an adverse employment action; and (4) that a member of outside his class later filled that position; or was terminated under circumstances that give rise to an inference of discrimination. *Adams v. Mt. St. Vincent Nursing Home*, MLW # 22-034-07 (MCAD, Charles Walker, Hearing Commissioner (August 4, 1997) *citing Murphy v. Pub Ventures*, 15 MDLR 1098, 1110-1111 (1993); *Runyon v. MIT*, 871 F.Supp. 1502 (D. Mass 1994); *Blare v. Husky Injection Molding Systems Boston, Inc.*, 419 Mass. at 437; *Pendergrast v. Metropolitan Police*, 16 M.D.L.R. at 1392-93 (1994); *see also, Fitzpatrick v. Boston Public Library*, 6 MDLR 1359, 1382-83 (1984); *Zayas v. Colonial Provisions Co.*, 3 MDLR 1022, 1030-31 (1981); *Godfrey v. Sancta Maria Hospital*, 2 MDLR 1366, 1372 (1980).

race, Petitioner would have received an original appointment to the BPD. Justice requires under these circumstances that the Title VII claims be allowed.

3. The Petitioner Could Not Have Made His Title VII or Ch. 151B Amendments Any Earlier than the Second Amended Complaint.

Prior to December 2002, Petitioner did not know and could not find out, not for lack of trying, whether and when exactly he had Title VII or Ch. 151B claims. Defendants repeatedly told him, the District Court and the First Circuit, even though it was not true, as later confirmed by *Donahue I*, that in fact no lower scoring minority without statutory preferences had been hired ahead of him.[4] See App. p. 51, attached hereto. Petitioner could not have included his Title VII or Ch. 151B claims any earlier. Given this history, and especially considering the District Court's and the First Circuit's involvement in the Consent Decree itself, the First Circuit should have been particularly sensitive to the appearance that it was unjustifiably protecting its own Consent Decree; yet, it would not consider or respond to Petitioner's arguments, preferring instead to simply deny his right to make them by stating that

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[4] *Donahue I* finally established, "notwithstanding the Defendants' persistent misrepresentations to the contrary, that indeed at least one minority candidate – one with no statutory preference or language skills – was appointed to the Academy despite having scored lower than Petitioner on the May 1999 exam and that "such evidence makes the conclusion inescapable: Petitioner would likely have been hired based on his May 1999 exam score if he were a minority applicant." 304 F. 3d. at 119-120. (Emphasis added.)

he had failed to obtain specific permission to add these claims to his Complaint.

Race was unequivocally a component of the Boston Police Department hiring process, and therefore Petitioner is entitled to make and prevail in his claims, especially given the lower Title VII threshold for the Petitioner's burden. The *Donahue I* holding that Petitioner would have been hired if he were a minority is itself sufficient to meet Title VII and ch. 151B standards, without need to revisit the 42 U.S.C. §1983 claims. Further, although the First Circuit refused to consider the Petitioner's Title VII claims, it is worth noting that had they, equitable tolling of the statute of limitations for the Title VII claim is applicable because there was an active attempt to mislead the Petitioner and the court. *See Thomas v. Eastman Kodak Company*, 183 F.3d 38 (1999)(hereafter, "*Thomas*"). The statute of limitations is also tolled because the City of Boston took a new employment action during the pendency of this action, *i.e.*, the passage and operation of §58A, as well as its exemption of the firefighters, along with the refusal of the Mayor to sign the police exemption because the Petitioner had filed the initial Complaint. Section 58A, applied as it has been in conjunction with the application of the Consent Decree, is a "new employment action" intending to or having the effect of resulting in a denial of not only the job to Petitioner and every member of his protected class, but also a denial of his rights to ever take the test again – *permanently denying his eligibility to ever be considered for appointment, even though §58A would not have applied to Petitioner given his age and score on the 1999 exam if he were a minority.* These subsequent employment actions caused Petitioner harm in addition to the harm caused to him as a result of the

fact that but for his race, his age, and his filing of this litigation challenging the unconstitutional Consent Decree, he would have been hired. Nor were the Petitioner's claims stale. There is simply no justifiable reason under Rule 15(a) or otherwise for the First Circuit to reject the Petitioner's right to amend his Complaint to include these claims.

4. Respondents' Retaliatory Actions Are "Continuing Violations" Under the Provisions of Title VII and c. 151B and Therefore the Statute of Limitations Had Not Run and Petitioner Should Be Permitted to Amend his Complaint.

Under Title VII and ch. 151B standards, Petitioner need only show that race was used in the hiring decision-making process, a fact already determined in *Donahue I*, meaning that if he were a minority, he would have received his "original appointment" and would have become a Boston Police Officer before he reached the age of 32, thereby rendering the application of §58A a non-issue. The First Circuit has erred in its judgment in refusing to consider that Petitioner is subjected to ongoing violations under Title VII and Ch. 151B as a result of the application of §58A as a bar to Petitioner's appointment to the police.

The SJC has held that a continuing violation, and in fact separate and distinct new violations, occur each day and constitute a new act of illegal discrimination, as long as the Petitioners' status on a seniority list remained lower than it would have been but for an illegal policy. *Lynn Teachers Union v. MCAD*, 406 Mass. 515, 549 N.E. 2d 97, 101 (1990). Thus, under this analysis, the Defendants' refusal to place Petitioner on

the certified hiring list because of his race is a daily, continuing violation of G.L. 151B. *Id.* The First Circuit has stated:

> The First Circuit has recognized two different types of continuing violations; systemic violations, which have their roots in a discriminatory policy or practice [that] itself continues into the limitation period, *DeNovellis v. Shalala*, 124 F. 3d 298, 307, First Circuit (1997), (quoting *Jenson*, 912 F. 2d at 923), and serial violations which are composed of a number of discriminatory acts emanating from the same discriminatory animus with each act constituting a separate wrong actionable under Title VII.

Thomas at 53. The continuing violations existing in this case are indisputable and are, by definition, systemic in that they result from the implementation of the 1973 Consent Decree, and the various actions of the Defendants concerning the passage and adoption of §58A and retaliation Petitioner has alleged.

The First Circuit justified its decision in *Donahue II* on the ostensible basis that Petitioner could not show that the Consent Decree prevented him from being "able and ready". In order to reach this conclusion, the First Circuit resolutely turned a blind eye to the impact of the Consent Decree upon the actual application of §58A, disingenuously persisting in its self-serving fiction that Petitioner is not able and ready merely because of his age, and refused to look at any of the Petitioner's Title VII or Ch. 151B claims. Presumably, the Court did not consider the Title VII

arguments because it rejected Petitioner's right to amend to add such claims. As set forth above, the refusal to permit the amendment was improper. In any case, the *Donahue II* result was contrived and preposterous given that the *only* reason that Petitioner ever came under the purview of §58A and its age limitation was because of the application of the 1973 Consent Decree to him and the resultant unequal treatment and denial of an original appointment in ***1999***. It was *only* because of the 1973 Consent Decree that the Petitioner and his similarly situated class were forced to take the 2001 exam, and were treated disparately under §58A.[5] If the Petitioner were a minority with his score, §58A would not have mattered, because he would have already been hired!

Petitioner was not 32 at the time that he took the May 1999 exam and therefore, if he were a minority, he would never have been required to wait until the 2001 exam. Petitioner has been denied equal protection because no minority with a score of 95 or better on the 1999 exam regardless of age was required to wait until the 2001 exam. [6] If the District Court had

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[5] The Petitioner's Similarly Situated Class is defined as every individual who scored 95 or higher on the 1999 police entrance exam (*i.e.*, the lowest scoring minority actually hired up to the highest scoring non-minority not hired) who did not have a statutory preference or language skills and who were 32 or older prior to the April 26, 2001 police exam.

[6] Moreover, Petitioner's argument against the application of §58A to him is valid even under 42 U.S.C. 1983, since Petitioner sought prospective injunctive relief prior to adoption of §58A, and prior to the date of First Circuit Holding in *Donahue I*. While the First Circuit held that under §1983 retroactive *declaratory relief* may not be available to Petitioner on the basis of standing, it must be remembered that the Complaint, the First Amended Complaint,

properly determined that Petitioner was not permitted to compete on equal footing because of his race, in the beginning, without the need for the first appeal to the First Circuit and its subsequent remand and directive, then the age 32 limitation and the question of "able and ready" would not be an issue now. As set forth above and at App. p. 51, the City of Boston consistently and repeatedly denied that the Petitioner scored high enough to be hired, even if he were a minority. Once the First Circuit held otherwise, then Title VII was immediately available to the Petitioner. Therefore, the retroactive hiring of the Petitioner was assured, since justification of the Consent Decree would be virtually impossible under this Court's standards of strict scrutiny. The First Circuit simply disregarded strict scrutiny, disregarded the impact of a race-based Consent Decree, and relied on the "able and ready" standard as if it existed outside the context of 31 years of race-based hiring in the City of Boston. Petitioner would have received an "original appointment" if he were a minority based on his result on the May 1999 exam; the proper grant of prospective relief sought by Petitioner (from the time he filed his very first Complaint) would have obviated the application of §58A to Petitioner under the provisions of Title VII. Petitioner's claim for *prospective injunctive* relief *prior to the application of §58A* should be allowed and retroactively applied to predate the adoption of the §58A age limitation.

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and indeed the Second Amended Complaint, all sought *forward-looking, and injunctive relief* against the further use of race against Petitioner.

B. The First Circuit and the District Court Disregarded the Holdings of this Court Regarding "Disparate Impact" on Similarly Situated Persons.

The First Circuit and the District Court did not want to jeopardize the 1973 Consent decree by considering the Title VII and Ch. 151B issues raised by Petitioner and, instead, simply rejected his right to make these claims and arguments by interposing the innovative requirement that Title VII and Ch. 151B amendments require specific permission. In this way, the First Circuit obviated the need to address the fact that §58A disparately impacts the Petitioner's Similarly Situated Class and is clearly in violation of Title VII and EEOC Guidelines. In the instant case, §58A *does* use age as a pretext for race, as evidenced by the unequivocal racial outcome §58A has as applied to the protected class of similarly situated individuals, of which Petitioner is a member.[7] There is nothing speculative about the impact on this class. *Donahue I* states that there were at least 7 minorities who scored

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[7] Even a facially neutral statute is subject to strict scrutiny once disparate racial impact is shown. *See, e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). Once the court concludes that race was a motivating factor in the governmental action, strict scrutiny is applied and, the courts are to look at the racially disproportionate impact in conjunction with other factors including the historical background of the government action, the specific sequence of events leading up to government action, and departures from normal procedure.

95 or better who were hired.[8] As a result, *Donahue I* has already established that the Petitioner has met his burden of demonstrating that the Petitioner's Similarly Situated Class was not treated equally. Certainly, *Donahue I* establishes that Petitioner is similar to the other members of the Similarly Situated Class in all relevant respects, as "those factual elements which determine whether reasoned analogy support or demand a like result." *Suffolk County Sheriff's Department v. MCAD*, 19 MDLR 187 (1997), citing *Smith v. Stratus Computer, Inc.* 40 F.3d 11, 12 (1st Cir. 1994). The level of review with regard to being treated differently is whether a prudent person would think that the minority and non-minority candidates were roughly equivalent and similarly situated. *Molloy v. Blanchard*, 115 F.3d 86, 91 (1st Cir. 1997). Again, it is disheartening that this First Circuit panel appears to deliberately disregard its own holdings in order to uphold and protect an unconstitutional Consent Decree. There can be no doubt that Petitioner and non-minority members of the Similarly Situated Class were treated dramatically differently from the minority members of that class. No minority who is a member of the Petitioner's Similarly Situated Class would have been required to take the 2001 exam (because they would have already been given appointments), while all non-minorities in the Petitioner's Similarly Situated Class would have been required to take the 2001 exam. Any

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[8] It is worth noting there are at least 6 non-minority candidates who scored 95 or better who were 32 years of age or older at the time of the 2001 exam, who were not hired because of the application of §58A. This includes Bradley Donahue, Joseph Fitzpatrick,, Kelli McLaughlin, Kevin Bowker, James Vederico and Timothy Creavan, all of whom attached Affidavits to the Petitioners Cross-Motion for Summary Judgment.

individual with a score of 95 or better on the May 1999 exam who was 32 or older at the time of the April 2001 exam, and was prevented from being hired based on age, was necessarily non-minority, since all minorities with a score of 95 or better on the May 1999 exam were hired. See *Donahue I*. One hundred percent of such individuals were white, since all minorities with scores above the lowest scoring minority actually hired would, by definition, have already been hired and therefore not subject to application of §58A. This conclusion is unavoidable based upon the First Circuit holding in *Donahue I. This is not disparate impact; it is exclusive impact*, and yet, the First Circuit panel of *Donahue II* categorically refused to consider this impact.

The City of Boston clearly took an action that was intended to impede the process of disestablishing the dual system resulting from the 1973 Consent Decree. It did so by refusing, for purely racial and retaliatory reasons, to prevent the unfair application of §58A to the Petitioner's Similarly Situated Class. It did this for one reason only: in retaliation for the Petitioner bringing this action. The best evidence of this is the fact that the City of Boston exempted from §58A firefighters in a similar position to Petitioner. Perhaps even more disturbing is the fact that the First Circuit refused Petitioner's Title VII and Ch. 151B amendments to his Complaint while using §58A in violation of this Court's holdings, all to preserve the effect of the discriminatory hiring policies inherent in the Consent Decree. By refusing to permit the Title VII and Ch. 151B amendments, the First Circuit has taken steps to prevent the Petitioner from challenging its 1973 Consent Decree, which at least this panel of the First Circuit is intent on isolating from review.

The 1973 Consent Decree remains the only consent decree still in place within the City of Boston. The District Court and other panels of the First Circuit have discontinued the other consent decrees after strict scrutiny review, including: admissions quotas for Boston Latin School, *McLaughlin v. Boston School Committee*, 938 F. Supp. 1001 (D. Mass 1996) (successfully challenging a racial admissions quota at Boston Latin School); *Wessmann v. Gittens*, 160 F.3d. 790 (1st Cir. 1998)(successfully challenging a replacement racially based quota for admission to Boston Latin School); hiring quotas for the Boston Fire Department, *Quinn v. City of Boston*, 325 F. 3d. 18 (1st Cir. 2003) (successfully challenging a decree identical to the 1973 Consent Decree challenged in the instant case)(different panel of the First Circuit). Since the *Donahue II* panel seeks to avoid challenge to the continuing use of the Consent Decree, it relies on the age restriction as if it exists in a vacuum, with no reference to the combined application of it with the Consent Decree. The court concluded that the age restriction denied the Petitioner standing, which then prevents him from challenging the Consent Decree as unconstitutional. Such a maneuver preserves discriminatory effects by precluding the Petitioner and others from being hired and from challenging the Consent Decree itself. Further, the strained logic of the First Circuit gives the appearance that it is working impermissibly in concert with the Defendants to preserve its Consent Decree.

This Court has held that where the government has been shown to act in a discriminatory manner in one part of a program, there is a high probability that the same discriminatory motive is behind other policies, especially those that further discriminatory objectives.

Keyes v. School District, 413 U.S. 189, 208 (1973)(hereafter "*Keyes*"). At this point, given the supervisory nature of the First Circuit's role in the 1973 Consent Decree, one would have expected the First Circuit itself, perhaps even on its own, to determine that the continued use of the Consent Decree violated this Court's standards of strict scrutiny. Its failure to independently halt the continued use of a blatantly unconstitutional Consent Decree suggests that there is a high probability that its motive with regard to the decision in *Donahue II* is at best questionable, and at worst, improper and unconstitutional. The First Circuit is an untenable position now requiring it to pass judgment on its own actions, its own motives, its own biases, and its own expectations concerning the Consent Decree.

Because §58A preserves the discrimination against Donahue and similarly situated individuals, the presumption established in *Keyes* creates a burden of proof under which the City of Boston, and indeed, perhaps the First Circuit itself, given its involvement in the Consent Decree, must show that race was not among the motivating factors for the adoption of the facially race-neutral §58A.[9] The problem for the City of Boston and the First Circuit is that Petitioner has sufficiently pled his Title VII claim in which five individuals state that they were told that the City of Boston, specifically the Mayor's Office, refused to sign the §58A exemption for police solely because it would

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[9] See *Keyes* at 210: "In discharging that burden, it is not enough, of course, that the school authorities rely on some allegedly logical racially neutral explanation for their actions. Their burden is to adduce proof sufficient to support a finding that a segregative intent was not among the factors that motivated their actions".

result in Petitioner being hired. If this is not punishing the Petitioner for bringing this action, then one would be hard pressed to define what retaliatory behavior is. The allegations made by Petitioner in the Second Amended Complaint unequivocally raise the specter of a "segregative intent" as well as a retaliatory intent in the refusal to exempt police from §58A. This would then lead the City of Boston and perhaps the First Circuit itself, to try to justify the refusal to exempt police from §58A by some other rational basis test standard such as public safety. For example, the First Circuit may attempt to rely on the need to have young police officers not older than 32 at the time that they are hired. In a vacuum, such an argument might have merit. However, a review of those hired and those eligible to be hired as Boston police officers indicates that §58A applied to a small percentage of those people who could actually be hired. For example, most people hired have a military preference that excludes the age 32 limitation. Similarly, fully one-third of police hires are not appointments under the statute, but are hires from the cadet program, which does not have an age 32 limitation. In fact, it is probable that a vast majority of those hired each year are not subject to the age 32 hiring limitation at all. Therefore, any "allegedly logical, racially neutral explanation" even by the standards of rational basis, could not justify the decision not to rescind.

C. The Disputed Facts Establish a Discriminatory and Retaliatory Pattern Against the Petitioner.

There is a clear pattern of discriminatory animus, as asserted in Count XII of the Second

Amended Complaint, which alleges a retaliation claim. This claim is supported by the Affidavits of Joseph Fitzpatrick, Kelli McLaughlin, Kevin Bowker, Edward Grace, James Verderico, and Timothy Creavin, each indicating that personnel from the Boston Mayor's office stated that the Mayor refused to sign a §58A exemption for police candidates solely because of the instant litigation. Once racial discrimination is shown to have been a substantial or motivating factor behind enactment of a law, or as in the instant case, refusal to sign the exemption as it applies to police, the burden shifts to the law's defenders to demonstrate that the law would have been enacted even without this factor. *Hunter v. Underwood*, 471 U.S. 222, 228 (1985). The Petitioner does not have to produce direct evidence, such as admissions of the relevant officials, but should be able to rely upon circumstantial evidence. *See, e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp*, 429 U.S. 252 (1977); *Anthony v. Sundlun*, 952 F. 2d 603 (1st Cir. 1991). Since the Petitioner has met his burden with the various Affidavits filed, the Defendants may avoid a finding of liability only by proving by a preponderance of the evidence that they would have made the same decision even if they had not allowed discrimination to play such a role. *Price Waterhouse v. Hopkins*, 490 U.S.228, 244 (1989). Here, the Defendants have supplied only a single Affidavit denying any retaliatory motive. "Notwithstanding a person's disclaimers, a contrary state of mind may be inferred from what he does from a factual mosaic tending to show he really meant to accomplish that which he professes not to have intended." *Anthony v. Sundlun* at 606.

Reviewing the totality of the circumstances, it is unmistakably clear based upon the chronology that the

refusal to sign the§58A police exemption is inextricably linked to Petitioner's asserting his rights through the instant litigation[10].

Petitioner has established a prima facie case of retaliation—indeed, he has gone beyond the requirements of prima facie showing and provided affidavits. Yet, the District Court and the First Circuit have not even addressed this claim[11]. Even a cursory

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[10] The chronology is as follows: May 9, 2000, Original Complaint filed; December 21, 2000: The City of Boston adopts §58A;April 26, 2001, police exam was given; October 24, 2001: City Council considers home rule amendment to exempt the police officer candidates from §58A;October 31, 2001: petitioner files his Second Amended Complaint asserting the inapplicability of §58A to him (the motion was denied by the Court and the Second Amended Complaint was not filed until after the First Circuit's decision in *Donahue I*); November 28, 2001: City Council votes unanimously to approve the Home Rule Petition as it applies to police officers;At some point after November 28th, obviously aware of the fact that the approval of the Home Rule Petition would result in Petitioner being hired, the Mayor's staff indicates that the Mayor will not sign the Home Rule Petition because of Petitioner's litigation, and he continues to refuse to sign it. See Affidavits of Kevin Bowker, Edward Grace, Joseph Fitzpatrick, and James Verderico.

[11] Petitioner has demonstrated: (1) that he was engaged in a protected activity, i.e. challenging the Consent Decree; (2) that the Defendants-Appellees were aware of the protected activity; (3) that he suffered a subsequent adverse employment action, i.e. the application of §58A to him and the Mayor's refusal to sign the §58A exemption for police candidates; and (4) evidence of the retaliatory motive or proximity in time between the protected activity and the adverse employment action, as can be seen in the above listed chronology and Affidavits. *Id. See Wyatt v. City of Boston*, 35 F. 3d 13 (1st Cir. 1994). The District Court and the First Circuit erred in granting summary judgment against the Petitioner. Because of the record of disputed facts included in the parties' respective affidavits, the allegation of retaliation is more than sufficient basis to proceed to trial.

review of the facts and circumstances show that the Mayor agreed to sign the exemption as to the firefighters after the City Council voted to approve such an exemption, but that he refused to sign the exemption unanimously approved by the City Council as to police. There are five Affidavits that state unequivocally that a City employee stated that the Mayor would not sign the exemption because of this litigation.

The Home Rule Petition exempting from §58A police candidates who took and passed the April 2001 exam was virtually identical to the Home Rule Petition that was approved exempting firefighters from the April 2001 exam. The City Council approved both Petitions. The only important difference between the two Petitions is the fact that the Mayor refused to approve the one relating to police candidates because he knew that if he approved it then Petitioner would receive an appointment.[12] Since the Petitioner has provided five affidavits supporting the allegation of retaliation, the District Court erred in granting summary judgment for the Defendants-Appellees because there remain disputed issues of fact.

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[12] The Defendants make much of the fact that the Home Rule Petition exempting police from §58A applied to the April 2001 exam, while the Petition exempting firefighters applied to the April 2000 exam, suggesting that this difference alone justifies the denial of the police exemption. However, what they failed to inform the District Court is that firefighter and police exams are given in alternate years, so there was no police exam given in 2000 and there was no firefighter exam given in 2001. The two Home Rule Petitions are consistent in that they each apply to their respective exam given closest in time to the acceptance by the City Council of §58A.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 03-2227

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRADLEY J. DONAHUE,
Plaintiff, Appellant,

v.

CITY OF BOSTON, THE BOSTON POLICE DEPARTMENT, AND PAUL F. EVANS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE BOSTON POLICE DEPARTMENT,
Defendants, Appellees.

June 8, 2004, Decided

COUNSEL: Michael C. McLaughlin for appellant.

Rory Fitzpatrick, with whom Irene C. Freidel, Wendy A. Berliner, and Kirkpatrick & Lockhart LLP, and William V. Hoch, Office of the Legal Advisor of the Boston Police Department, were on brief for appellees.

JUDGES: Before Torruella and Lipez, Circuit Judges, and Lisi, * District Judge.

OPINION BY: LIPEZ

OPINION: LIPEZ, Circuit Judge. This equal protection case is before us for the second time. See

Donahue v. City of Boston, 304 F.3d 110 (1st Cir. 2002) (Donahue I). Appellant Bradley Donahue sued the City of Boston, the Boston Police Department (BPD), and various public officials, alleging that the hiring practices of the BPD, which are governed by a federal court consent decree, violate the Constitution's guarantee of equal protection. The district court found that Donahue lacked standing to pursue his suit and entered summary judgment in favor of the defendants. On appeal, we affirmed the decision below as to Donahue's claim for damages but remanded to the district court for a determination as to whether Donahue had standing to pursue his claim for prospective relief.

On remand, after further proceedings, the district court held that when Donahue last took the qualifying civil service exam in April 2001, he was no longer eligible for hire to the BPD due to the age restriction of thirty-two for certification for original appointment to a police officer position imposed by Mass. Gen. Laws ch. 31, § 58A. Finding that the statute was valid, constitutional, and applicable to Donahue, the court concluded that Donahue was not able and ready to apply to the BPD and therefore lacked standing to pursue his claim for prospective relief. We affirm.

I.

The facts of this case are laid out in detail in Donahue I. We briefly review those facts that are relevant to the present appeal, recounting them in the light most favorable to Donahue. Landrau-Romero v. Banco Popular de P.R., 212 F.3d 607, 611 (1st Cir. 2000).

To become a police officer with the BPD, an individual must first pass a statewide civil service examination, which is administered by the Commonwealth of Massachusetts Human Resources Division (HRD). The BPD's hiring procedures are governed in part by a consent decree that was entered in 1973. See Castro v. Beecher, 365 F. Supp. 655, 661-62 (D. Mass. 1973). After the HRD administers the exam, it compiles an "eligible list" of individuals who received a passing score on the examination and who therefore are eligible for appointment to a civil service position. In accord with the terms of the consent decree, HRD alternates minority and non-minority candidates on the eligible list. The candidates included on the eligible list are divided into residents and non-residents of Boston, with residents ranked higher than similarly situated non-residents, subject to the alternation requirement of the consent decree. Among the residents, certain candidates are entitled to a statutory preference and are ranked higher than those without a preference, again subject to the consent decree requirement. When hiring a new class of police officers, the BPD notifies the HRD of the number of positions it wishes to fill. HRD then certifies twice the number of persons requested plus one, selecting names from the eligible list in rank order. The BPD must appoint candidates in order of their position on the certification list, unless it provides a reason for bypassing a candidate. n1

Bradley Donahue, a white male, is a police officer for the Town of Yarmouth, Massachusetts. Prior to his employment in Yarmouth, he was employed by the University of Massachusetts police. Neither of these positions required Donahue to take an entrance exam.

However, Donahue aspired to become a police officer with the BPD and sought appointment by taking the HRD civil service examination. Because he did not qualify for a statutory hiring preference, he could only be appointed from the general certification list according to his score on the examination and subject to the consent decree. He took the civil service exam in April 1997 and May 1999, receiving passing scores of 92 and 96 respectively. On each occasion, he was placed on the eligible list but was not hired by the BPD. He filed this lawsuit on May 10, 2000, alleging that the BPD's procedures and appointments following the two civil service tests discriminated against him on the basis of race, in violation of the United States Constitution and 42 U.S.C. §§ 1981 and 1983. See Donahue v. City of Boston, 183 F. Supp. 2d 202 (D. Mass. 2001). n2 In March 2001, Donahue sought, and was granted, permission to amend his complaint to include additional allegations relating to the BPD's hiring of police officers from the eligibility lists created from the 1999 exam.

On April 26, 2001, while his case was pending in the district court, Donahue again sat for the statewide civil service exam, passing with a score of 100. However, one year earlier, the Massachusetts Legislature had adopted a statute providing that in any municipality adopting the law, no person who has reached the age of thirty-two on the date of the entrance examination shall be eligible to have his or her name certified for "original appointment" to a municipal police officer position. 2000 Mass. Acts ch. 242 (codified at Mass. Gen. Laws. ch. 31, § 58A) (§ 58A). Boston adopted the provisions of § 58A in December 2000. Donahue had reached the age of thirty-two by the date of the April 2001 examination.

Hence, his name was not included on the certification list that the HRD forwarded to the BPD on September 14, 2001.

On November 28, 2001, the Boston City Council passed a home rule petition to exempt from § 58A any Boston resident who took the April 2001 civil service examination for appointment to the BPD until his or her eligibility expired. Several months earlier, the City Council had passed a similar home rule petition exempting from the statute applicants to the Boston Fire Department who, unlike the police officer candidates, took the 2000 civil service exam that was held prior to the enactment of § 58A. That petition had been approved by the Mayor of Boston and enacted by the Massachusetts Legislature, as is required for such a petition to become law. See Mass. Const. Amend. Art. 2, § 8. However, because the Mayor of Boston did not approve the home rule petition as to police officer candidates, it was never presented to or enacted by the Legislature. Therefore, no candidates for appointment to the BPD were exempted from § 58A.

Meanwhile, on May 30, 2001, the defendants moved for summary judgment on the ground that Donahue lacked constitutional standing to assert the claims alleged in his complaint. On September 13, 2001, Donahue filed a cross-motion for summary judgment, claiming that the consent decree was unconstitutional based on the uncontested facts. In their opposition to Donahue's motion, filed on October 29, 2001, the defendants argued in part that Donahue lacked standing to seek prospective relief because he was ineligible for appointment to the BPD under § 58A. Two days later, Donahue moved for leave to amend his complaint to

challenge the validity, applicability, and constitutionality of § 58A.

On December 13, 2001, the district court granted summary judgment in favor of the defendants, finding that Donahue lacked standing to pursue his claim. It held, in particular, that Donahue's test scores were such that he would not have been hired, even in the absence of the consent decree: "Donahue's test scores and lack of statutory preference doomed his candidacy to failure before the consent decree came into play." Therefore, the district court concluded that Donahue had not suffered any injury and had no standing to challenge the constitutionality of the consent decree. On December 14, the district court entered orders denying Donahue's motion for summary judgment and his Motion to Amend the First Amended Complaint on the ground that they were now moot. Donahue timely appealed.

In Donahue I, we affirmed the district court's holding that Donahue lacked standing to pursue his claim for damages, explaining that more than 580 non-minority applicants had scored higher than Donahue on the April 1997 exam but were not hired, while the eligible list created after the 1999 exam included 117 non-minority candidates between Donahue and the last non-minority appointee. Given his placement on the eligible lists, we concluded that Donahue would not have been hired by the BPD even under a race-neutral policy. Because Donahue would not have qualified for hiring in the absence of the consent decree, he lacked the causation and injury-in-fact required to establish standing to assert a claim for damages. See Donahue I, 304 F.3d at 116-19.

We explained, however, that a plaintiff may have standing to assert an equal protection claim for prospective relief, even if he or she does not have standing to pursue a claim for damages. Where a plaintiff challenges an on-going race conscious program and seeks prospective relief in the form of an injunction and a declaratory judgment, "the relevant injury . . . is the 'inability to compete on equal footing.'" Id. at 119 (quoting Texas v. Lesage, 528 U.S. 18, 21, 145 L. Ed. 2d 347, 120 S. Ct. 467 (1999)). Thus, a plaintiff may have standing to pursue a claim for prospective relief if he or she "has or is likely to be exposed to unequal treatment." Id. (citation and internal quotation marks omitted). In Donahue's case, at least one candidate without special language skills or a statutory preference was hired despite a lower score than Donahue's on the May 1999 exam. Therefore, Donahue was not able to compete on an equal footing with other candidates because of his race, a key element of standing to seek forward-looking relief. Id. at 119-20.

However, we cautioned that unequal treatment was not enough. A plaintiff seeking to establish standing to pursue a claim for prospective relief "must also be able to show that he is 'able and ready' to apply for the benefit and that the challenged 'discriminatory policy prevents [him] from doing so.'" Id. at 119. (quoting Northeastern Fla. Chapter Assoc. of Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 666, 124 L. Ed. 2d 586, 113 S. Ct. 2297 (1993)). The appellees argued that Donahue was not able and ready to apply for a future appointment to the BPD because he was over thirty-two years old and was thus ineligible for an original appointment under the terms of § 58A. Donahue countered that § 58A was no longer in effect and did not

apply to him because, as a Yarmouth police officer, he was not seeking an original appointment. Noting that the parties had not provided sufficient factual and legal support for their positions to enable us to assess the effect of § 58A on Donahue's standing to bring suit, we remanded the case to the district court for further consideration of Donahue's equal protection claim for prospective relief. We also directed the district court to reevaluate Donahue's Motion to Amend the First Amended Complaint, which, in light of our ruling, was no longer moot.

On December 10, 2002, the district court held a status conference to address the mandate from this court. At the end of the conference, the court issued an order allowing Donahue's October 2001 Motion to Amend the First Amended Complaint and allowing the defendant subsequently to file a motion for summary judgment "on the issues of the constitutionality and applicability of [§ 58A]."

Donahue filed his Second Amended Complaint on December 30, 2002. In addition to challenging the validity and application of § 58A, as proposed in Donahue's Motion to Amend the First Amended Complaint, the Second Amended Complaint included new claims of age and race discrimination under 42 U.S.C. §§ 1983, 1985, and 1986; Mass. Gen. Law ch. 151B, and ch. 31; Title VII; and the United States and Massachusetts Constitutions.

The City subsequently moved for summary judgment and/or to dismiss all of the claims in Donahue's Second Amended Complaint. Donahue filed a cross-motion for summary judgment. On June 4, 2003, the district court

granted summary judgment for the City, holding that there was "no evidence that § 58A (1) is no longer in effect; (2) does not apply to [Donahue]; or (3) is unconstitutional." Because § 58A prevented Donahue from being appointed to the BPD on account of his age, Donahue was not "able and ready" to compete for a position in the BPD and therefore lacked standing to pursue his claim for prospective relief. The district court declined to address the additional claims that Donahue had added to his Second Amended Complaint, explaining that "although the parties make a number of arguments in their briefs, this court believes that § 58A's effect on Donahue's candidacy is the only remaining issue in this case." This appeal followed.

II.

We review de novo the district court's entry of summary judgment for the defendants, evaluating the record in the light most favorable to Donahue. Suarez v. Pueblo Intern., Inc., 229 F.3d 49, 53 (1st Cir. 2000). Donahue claims that the district court erred in concluding that he lacks standing to assert an equal protection claim seeking prospective relief. In addition, he argues that the district court erroneously failed to address the new counts that Donahue added to his Second Amended Complaint. We address each of these claims in turn.

A. Standing to Assert Claim for Prospective Relief

Donahue challenges the district court's conclusion that § 58A prevents him from being appointed to the BPD, thereby depriving him of standing to seek prospective relief in the form of an injunction against the operation

of the consent decree. n3 It appears that Donahue has abandoned on appeal his earlier claims that § 58A is no longer in effect and does not apply to him because he is not seeking an original appointment with the BPD. Rather, he argues that § 58A should not apply to him because he was entitled to be hired based on the results of the 1999 examination. He also claims that the district court erred by upholding the constitutionality of § 58A under a rational basis test rather than applying strict scrutiny. Both of these arguments are unpersuasive.

1. Applicability of § 58A

Frankly, we have found it difficult to understand the precise nature of Donahue's claim that § 58A does not deprive him of standing to seek prospective relief. Essentially, he seems to claim that § 58A should not be applied to him because he was entitled to be hired to the BPD based on the results of the 1999 examination. He argues in his brief that he "took the qualifying exam in 1999 and scored high enough at that time that he would have been hired but for his race." Therefore "it was only because of the Consent Decree that [Donahue] . . . was forced to take the 2001 exam, and [was] treated disparately under 58A." (emphasis in original).

This argument relies on an erroneous reading of Donahue I. As we emphasized in that opinion, Donahue would not have been hired in 1999 in the absence of the consent decree. Approximately 120 non-minority applicants scored higher than Donahue on the 1999 test but were also denied appointment to the BPD. All of those candidates would have been eligible for appointment before Donahue. As we explained, irrespective of the consent decree, "Donahue was too

far down the list to be even remotely considered for hiring" to the BPD based on his 1999 test score. See Donahue I, 304 F.3d at 117. Therefore, Donahue was not entitled to an appointment prior to the enactment of § 58A and would have been subject to the statute's age restrictions in April 2001 even under a race-neutral hiring policy.

We found in Donahue I that Donahue was denied the opportunity to compete on equal footing in the BPD's hiring process on account of his race in connection with the 1999 exam. Id. at 120. However, unequal treatment is not itself sufficient to establish standing to seek prospective relief; Donahue must also be able to demonstrate that he is "able and ready" to apply for a position with the BPD and is prevented from doing so by the challenged discriminatory policy, that is, the operation of the consent decree. Id. at 119 (quoting Jacksonville, 508 U.S. at 666); see also Gratz v. Bollinger, 539 U.S. 244, 284, 156 L. Ed. 2d 257, 123 S. Ct. 2411 (2003) ("To seek forward-looking, injunctive relief, petitioners must show that they face an imminent threat of future injury."); O'Shea v. Littleton, 414 U.S. 488, 495-96, 38 L. Ed. 2d 674, 94 S. Ct. 669 (1974) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."). Because of § 58A's age limitation, Donahue was not able and ready to apply for appointment to the BPD in December 2001 when the district court issued its original opinion in this case, nor is he eligible for such an appointment today. Thus, Donahue does not satisfy a key element of standing to seek prospective relief. n4

2. Constitutionality of § 58A

Donahue further claims, however, that the district court erred in upholding the constitutionality of § 58A under the Equal Protection Clause of the Fourteenth Amendment on the ground that its age classification is rationally related to a legitimate public purpose. Donahue argues that § 58A is subject to strict scrutiny rather than rational basis analysis because the statute has a disproportionate impact on non-minorities, which, coupled with other relevant facts, demonstrates that the statute has "an invidious discriminatory purpose." Washington v. Davis, 426 U.S. 229, 242, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976) (although a statute is not unconstitutional solely because it has a racially disproportionate impact, "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if true, that the law bears more heavily on one race than on another"); see also Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 265, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977) (racially disproportionate impact does not constitute a violation of the Equal Protection Clause absent "proof of racially discriminatory intent or purpose").

More specifically, Donahue argues that minorities who scored at least a 95 on the 1999 exam were hired prior to the enactment of § 58A and are not affected by the statute's age limitation. Therefore, he asserts that "Section 58A as applied to the Donahue Similarly Situated Class is so inextricably bound to the Consent Decree as to amount to an extension of its application: but for the Consent Decree, the non-minority members of the Donahue Similarly Situated Class would not come under the purview of § 58A, because they would

have received original appointments before they turned 32." n5 In other words, Donahue claims that § 58A has a disproportionate impact on non-minorities who took the 1999 exam and scored between a 95 and the lowest score of a hired non-minority. That disproportionate effect, he suggests, gives rise to an inference of purposeful racial discrimination. n6

We agree with the district court that strict scrutiny is not required. Section 58A has an identical effect on minorities and non-minorities competing for an original position with the BPD. Anyone who has reached the age of thirty-two on the day of the applicable civil service exam is precluded from seeking an original appointment, regardless of his or her race. If some minorities were no longer seeking an original appointment at the time of the April 2001 exam because they had already been hired by the BPD, this was in no way a consequence of § 58A. Therefore, § 58A's age restriction does not have a disproportionate impact on non-minorities.

Assuming arguendo that Donahue presented adequate grounds for concluding that § 58A had a racially disproportionate impact, there is no evidence that the Massachusetts Legislature, in enacting the statute, was motivated by a racially discriminatory intent against non-minorities. Because Donahue has not shown that the statute's distinction between older and younger candidates evinces purposeful discrimination on the basis of race, strict scrutiny does not apply to our review of § 58A, notwithstanding any racially disproportionate effect.

Unlike race, age is not a suspect classification under the Fourteenth Amendment's Equal Protection Clause. Therefore, "states may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest." Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83, 145 L. Ed. 2d 522, 120 S. Ct. 631 (2000). In addition, a state may rely on age as a proxy for other characteristics relevant to a state's legitimate interests, even if that reliance turns out to be misplaced. See id. at 84. A court will not overturn an age classification so long as the state articulates some "reasonably conceivable state of facts that could provide a rational basis for the classification." FCC v. Beach Communications, Inc., 508 U.S. 307, 313, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993). Those facts need not be supported by the evidentiary record, Kittery Motorcycle, Inc. v. Rowe, 320 F.3d 42, 47 (1st Cir. 2003), as "any 'plausible' justification will suffice, and effectively ends the analysis," Starlight Sugar, Inc. v. Soto, 253 F.3d 137, 145 (1st Cir. 2001) (quoting Beach, 508 U.S. at 313-14). Under this forgiving standard, the party challenging the constitutionality of the age classification bears the burden of "negating any conceivable basis which might support it." Beach, 508 U.S. at 315 (citation and internal quotation marks omitted).

Donahue has not met his burden of establishing that § 58A is not rationally related to a legitimate state interest. Edward P. Callahan, Director of Human Resources for the BPD, stated in his sworn affidavit that the BPD supported the City's adoption of § 58A because the age limitation encouraged a long-term commitment to the BPD, ensured the physical fitness of

its officers, and reduced strain on the BPD's pension system. On appeal, Donahue does not attempt to discredit the legitimacy of these rationales for § 58A's age classification. Indeed, while insisting that the statute must be evaluated under a strict scrutiny standard, he concedes that the "purported 'rational basis' for the age discrimination contained in § 58A by the City, even if proffered by the correct legislative body (which it was not), n7 would meet . . . the minimal standards of rational basis." Notwithstanding Donahue's claim to the contrary, it does not matter whether the City Council actually relied on the reasons offered by Callahan in adopting § 58A. See Beach, 508 U.S. at 315 ("Because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."). As Donahue appears to recognize, those reasons evince a legitimate public purpose that is rationally related to § 58A's age restriction. Hence, we agree with the district court that § 58A passes constitutional scrutiny. Because Donahue is not eligible for appointment to the BPD on account of his age, he does not have standing to obtain injunctive relief to prevent the operation of the consent decree.

2. Additional Claims Advanced in Donahue's Second Amended Complaint

Donahue argues that the district court erred by refusing to consider various claims advanced in his Second Amended Complaint, including claims for relief pursuant to 42 U.S.C. §§ 1983, 1985, and 1986; Mass. Gen. Law ch. 151B, and ch. 31; Title VII; the United States and Massachusetts Constitutions, and the

doctrine of equitable estoppel. The defendants respond that the court appropriately declined to address these claims because they appeared for the first time in Donahue's Second Amended Complaint without the permission of the court.

Donahue claims that our holding in Donahue I made clear that Donahue was entitled to amend his complaint to include a broad range of additional counts. This argument mischaracterizes the scope of our remand order. In Donahue I, we remanded the case to the district court to consider whether § 58A obviated Donahue's standing to seek prospective relief in the form of an injunction against the federal consent decree. We also directed the district court to reconsider Donahue's Motion to Amend the First Amended Complaint, noting that the decision to allow or disallow such an amendment was "well within the district court's discretion." Donahue I, 304 F.3d at 121; see also OConnell v. Hyatt Hotels of P.R., 357 F.3d 152, 154 (1st Cir. 2004) ("We review the denial of a motion to amend the pleadings for an abuse of discretion and will affirm if any adequate reason for the denial is apparent from the record."). Although we observed that Donahue might have advanced a claim under Title VII, we certainly did not require the district court sua sponte to consider, let alone to allow, the addition of that or other new claims that were not raised in a motion to amend. Rather, we simply noted that, in light of our remand, the district court could no longer deny Donahue's motion to amend on mootness grounds. Therefore, we directed the district court to determine - in its discretion - whether Donahue's "proposed amendments" were appropriate. Notably, Donahue's

proposed amendments did not include the new claims that Donahue now seeks to advance.

After the service of responsive pleadings, a party may amend his or her complaint "only by leave of the court or by written consent of the adverse party." Fed. R. Civ. P. 15(a). Yet, on remand, Donahue never moved the district court to add new claims beyond those raised in his earlier motion to amend. Moreover, at the status conference held by the district court to address the scope of this case on remand, Donahue's counsel never mentioned Title VII, ch. 151B, or the other counts that later appeared in Donahue's Second Amended Complaint. Nor did he object when the attorney for the defendants framed the issues on remand as: 1) whether § 58A is still in force in the City of Boston; 2) whether it applies to Donahue; and 3) whether it is constitutional. Rather, he agreed to file an amended complaint that would provide the basis for addressing those specific issues. The district court's order issued at the conclusion of the status conference allowed Donahue's Motion to Amend the First Amended Complaint so described; it did not invite the addition of any other claims that might occur to the plaintiff. Finally, in its opinion granting summary judgment for the defendants, the district court expressly declined to consider the new claims purportedly advanced in the Second Amended Complaint, noting that "although the parties make a number of arguments in their briefs, this court believes that § 58A's effect on Donahue's candidacy is the only remaining issue in the case."

In short, the district court did not abuse its considerable discretion in declining to expand the scope of this case beyond the issues presented on remand and

raised in Donahue's previous motion to amend, particularly as Donahue never sought the district court's leave to add those new claims prior to the filing of his Second Amended Complaint. n8 See, e.g., Wagner v. Daewoo Heavy Indus. Am. Corp., 314 F.3d 541, 542 (11th Cir. 2002) ("A district court is not required to grant a plaintiff leave to amend his complaint sua sponte when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court.").

III.

The defendants request that we dismiss with prejudice the claims included in Donahue's Second Amended Complaint that were never properly presented to or considered by the district court. They further ask us to find Donahue's appeal frivolous and sanction him pursuant to Fed. R. App. P. 38. Those requests are denied. However, for the reasons stated herein, the decision of the district court is affirmed.

So ordered.

Footnotes

* Of the District of Rhode Island, sitting by designation.

n1 Special certification lists may be created of individuals who qualify for a statutory hiring preference based on their ability to speak particular languages. In addition, the BPD may go outside of the general certification list to appoint police cadets, former recruit officers from a previous class, and former

members of the BPD who retired due to disability and are seeking reinstatement. Donahue is not eligible for appointment through any of these alternative hiring routes.

n2 Donahue also advanced claims under 42 U.S.C. §§ 1985 and 1986 against certain state officials based on their alleged failure to comply with his public records requests. The district court granted summary judgment on those counts in favor of the state defendants, and we affirmed on appeal.

n3 The relevant prospective remedy for Donahue's alleged inability to compete on an equal footing under the consent decree is "an injunction against the operation of the consent decree." Donahue I, 304 F.3d at 121. It is not, as Donahue variously suggests, the remedy of a court order appointing Donahue to the BPD or an injunction against the operation of § 58A.

n4 We note that this case is not a class action, which may sometimes proceed even if the named plaintiff's claim has become moot during the pendency of the litigation. See Gratz,539 U.S. at 286 n.5 ("If a named class representative has standing at the time a suit is initiated, class actions may proceed in some instances following the mootness of the named class representative's claim.").

n5 In his reply brief, Donahue explains that in referring to a "Donahue Similarly Situated Class," he does not seek to construe this case as a class action but rather to indicate the similarly situated group of individuals among whom the application of § 58A has a racially disproportionate impact.

n6 Donahue variously asserts that in Quinn v. City of Boston, 325 F.3d 18 (1st Cir. 2003), we applied strict scrutiny to a statute that had a racially disproportionate impact, thereby establishing that "any statute that results in a race-based outcome must survive strict scrutiny." This argument misconstrues Quinn, which applied heightened scrutiny to "a judicial decree affording race-based relief," not a race-neutral statute that had an allegedly racially disproportionate impact. Id. at 28.

n7 In other words, Donahue argues that "the justification for § 58A can only be enunciated by the legislative body promulgating or implementing the statute," not by Edward Callahan or the BPD.

n8 Although Donahue's Motion to Amend the First Amended Complaint vaguely alluded to "alleged retaliatory aspects of the Defendants' actions against the Plaintiff" and separately mentioned "additional Counts under the provisions of 42 U.S.C. § 1983," those vague references did not come close to presenting the comprehensive § 1983 retaliation claim that appeared for the first time in Donahue's Second Amended Complaint. Moreover, Donahue filed his motion to amend in October 2001, about a month before the Mayor of Boston allegedly retaliated against Donahue by refusing to sign the home rule petition passed by the City Council. That refusal is the core of Donahue's retaliation count in his Second Amended Complaint. Therefore, the district court did not grant Donahue leave to include the § 1983 retaliation claim in his Second Amended Complaint when he allowed the motion to amend.

Civil Action No. 00-10884-JLT

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRADLEY J. DONAHUE,
Plaintiff,

v.

CITY OF BOSTON, et al.,
Defendants.

June 4, 2003, Decided

COUNSEL: For Minority Applicants, Massachusetts Association of Minority Law Enforcement Officers, Movants: Nadine M. Cohen, LEAD ATTORNEY, Lawyers Committe for Civil Rights Under Law of the Boston Bar Association, Boston, MA.

For James J. Hartnett, Jr., Defendant: Edward J. DeAngelo, LEAD ATTORNEY, Attorney General's Office, Boston, MA.

For Boston Police Dept., Defendant: Rory J. Fitzpatrick, LEAD ATTORNEY, Irene C. Freidel, LEAD ATTORNEY, Andrew C. Glass, LEAD ATTORNEY, Kirkpatrick & Lockhart, Boston, MA.

For Boston Police Dept., Defendant: William V. Hoch, LEAD ATTORNEY, Office of the Legal Advisor Staff Attorney, Boston Police Department, Boston, MA.

For James J. Hartnett, Jr., Defendant: Ginny Sinkel, LEAD ATTORNEY, Attorney General's Office, Boston, MA.

For Minority Applicants, National Association for the Advancement of Colored People, Massachusetts Association of Minority Law Enforcement Officers, Movants: Toni G. Wolfman, LEAD ATTORNEY, Foley Hoag LLP, Boston, MA.

JUDGES: Joseph L. Tauro, United States District Judge.

OPINIONBY: Joseph L. Tauro

OPINION:

MEMORANDUM

June 4, 2003

TAURO, J.

Plaintiff Bradley Donahue ("Donahue") brought suit against the City of Boston, the Boston Police Department ("BPD"), and various public officials, n1 alleging that the hiring practices of the BPD, governed by the consent decree issued by this court in Castro v. Beecher n2 ("consent decree"), are discriminatory under the Fourteenth Amendment to the Constitution, 28 U.S.C. § § 2201 and 2202, and 42 U.S.C. § § 1981, 1983, 1985 and 1986. On December 13, 2001, this court allowed Defendants' summary judgment motion, finding that Plaintiff lacked standing to pursue his suit.n3

On appeal, the First Circuit Court of Appeals affirmed that dismissal as to Donahue's claim for damages. n4 But, the Court of Appeals found that Donahue might have standing to pursue his claim for prospective relief. The basis for that determination was that Donahue had made a sufficient showing that, as a result of the consent decree, he was unable to compete on an equal footing in the BPD's hiring process. n5 The case was thus remanded to this court for a determination as to whether Donahue did in fact have standing to pursue his claim for prospective relief. Before the court now are Donahue's and Defendants' cross-motions for summary judgment.

BACKGROUND

Since 1997, Donahue has been employed as a police officer for the Town of Yarmouth, Massachusetts. n6 Prior to his employment with the Town of Yarmouth, Donahue was employed by the University of Massachusetts Police. n7 Neither of these positions required Donahue to take a civil service examination.n8

To become a police officer with the BPD, however, a candidate must pass a statewide civil service examination. That examination is administered by the Commonwealth of Massachusetts Human Resources Division ("HRD"). n9 After it administers the exam, HRD compiles an "eligible list" of people who received a passing score on the examination, and who are therefore eligible for appointment to a civil service position. n10 HRD alternates minority and non-minority candidates on the eligible list pursuant to the consent decree ("alternation requirement"). n11

The candidates on the eligible list are divided into residents and non-residents of Boston. n12 Residents, regardless of score, are ranked higher than are equally situated non-residents, subject to the alternation requirement of the consent decree. Within the group of residents, some have a statutory preference and are ranked higher than those without a statutory preference. The statutory preferences are: (1) the child of a firefighter or police officer who was killed or sustained injuries that resulted in death; (2) disabled veterans; (3) veterans; and (4) widows, or widowed mothers of veterans who were killed in action or died from a service-connected disability incurred in wartime service. n13 Those candidates with a statutory preference are all ranked higher than are those without a statutory preference, subject to the alternation requirement of the consent decree. n14

Plaintiff Donahue does not qualify for a statutory preference. He, therefore, is ranked according to his score on the civil service examination. n15

In order to hire a new class of student officers, the BPD requisitions from HRD the exact number of positions it wishes to fill. n16 HRD then certifies a sufficient number of names from the eligible list. n17 Starting from the top of the eligible list, and moving down in strict rank order, HRD certifies twice the number of persons requested by the BPD, plus one (2n +1), and thereby creates the "certification list." n18 The BPD must select candidates for appointment in order of their position on the certification list, starting with the highest-ranking person, unless it supplies a reason for bypassing someone. n19

In addition to the above hiring procedures, the BPD can hire new officers in three other ways. It can appoint: (1) police cadets; n20 (2) former members of the BPD who retired because of disability and are seeking reinstatement; n21 and (3) former recruit officers from a previous class. n22 None of these alternative methods are available to Plaintiff Donahue, and he can thus only be appointed, if at all, from the general certification list.

Donahue's initial complaint challenged the procedures followed, and the appointments made, by the BPD as a result of both the April 1997 and May 1999 civil service exams. n23 He asked this court to issue an order appointing him as a student officer, retroactive to July 2, 1998, awarding him damages for his lost wages, overtime, and other benefits, enjoining Defendants from using race in making any future decisions involving him, and awarding him attorneys' fees. n24

On December 13, 2001, this court allowed Defendants' motion for summary judgment, finding that Plaintiff lacked standing to pursue his claim. n25 In particular, this court held that Donahue lacked standing, because his test scores were so low that he would not have been hired, even in the absence of the consent decree. As a result of his April 1997 civil service exam score, Donahue was approximately number 1350 on the eligible list. Two certification lists were prepared from that eligible list, and the BPD hired 139 officers, 126 of whom qualified for a statutory preference. There were, therefore, only thirteen spots for those that could be hired pursuant to the consent decree. Prior to considering Donahue for such an appointment, the BPD

would have had to consider, and reject, 586 other applicants with better scores. n26

Similarly, Donahue's score on the May 1999 exam placed him at approximately number 326 on the eligible list. Only one certification list was created from the results of the May 1999 exam. There were only seven spots for those hired pursuant to the consent decree, and the BPD would have had to consider, and reject, 117 candidates for those 7 spots before it considered Donahue. n27 Typically, the BPD hires one person for every three persons listed on an eligible list. n28 This court, therefore, found that "the undisputed facts demonstrate that Donahue's test scores and lack of statutory preference doomed his candidacy to failure before the consent decree came into play. Because Donahue has no injury, he has no standing." n29

On appeal, the First Circuit Court of Appeals agreed that Donahue lacked standing to pursue his claim for damages. n30 The Court of Appeals did not agree, however, that Donahue necessarily lacked standing to pursue his claim for prospective relief. n31 The First Circuit held that a plaintiff has standing to pursue a claim for prospective relief if that person has been denied an opportunity to compete on an equal footing. Because at least one minority candidate without a statutory preference or language skills was hired despite a lower score than Donahue's on the May 1999 exam, the Court found sufficient evidence that Donahue had not been able to compete on an equal footing. n32 The Court of Appeals found "inescapable" the conclusion that "Donahue would likely have been hired based on his May 1999 exam score if he were a minority applicant." n33

Well after this litigation began, Donahue sat for the civil service exam a third time. In April 2001, the Commonwealth administered another statewide civil service examination. n34 Donahue passed with a score of 100. n35 When he took the exam, however, Donahue had already reached age thirty-two. n36 He was, therefore, ineligible for hire to the BPD because of the passage of Mass. Gen. Laws ch. 31 § 58A ("§ 58A"). Under § 58A, "no person shall be eligible to have his name certified for original appointment to the position of firefighter or police officer if such person has reached his thirty-second birthday on the date of his entrance examination." n37

HRD prepared the initial eligible list of applicants to the BPD based on the results of the April 2001 exam on September 1, 2001. n38 Because of § 58A's enactment, Donahue's name did not appear on that list. n39 On September 14, 2001, HRD prepared the certification list and forwarded it to the BPD. n40 As his name did not appear on the eligible list, Donahue's name was also absent from the certification list, and once again Donahue was not hired by the BPD. n41 In light of the First Circuit's remand order, and Donahue's performance on the April 2001 exam, this court allowed Donahue to file a Second Amended Complaint and asked the parties to brief the court on § 58A's age limitation and its effect on Donahue's candidacy. n42

DISCUSSION

Both parties have filed motions for summary judgment. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." n43 When a trial court decides a motion for summary judgment, it "examines the entire record in the light most flattering to the nonmovant and indulges all reasonable inferences in that party's favor."n44

A plaintiff has standing to pursue a claim for prospective relief if he can establish that he has been exposed to unequal treatment. n45 "However, because the relief sought is forward looking, the plaintiff must also be able to show that he is able and ready to apply for the benefit and that the challenged discriminatory policy prevents him from doing so." n46 For Donahue to proceed with the instant suit, therefore, he must show that he was unable to compete on an equal footing with other applicants to the BPD because of his race. One minority applicant was hired even though that minority applicant's score was lower than Donahue's on the May 1999 exam. The First Circuit has already held, therefore, that Donahue was not able to compete on an equal footing. n47 And so, Donahue has satisfied the first prong of the standing inquiry for a claim seeking prospective relief.

The standing inquiry does not end there, however. Donahue must also establish that he is able and ready to apply for a position with the BPD, and that it is the consent decree that prevents him from doing so. Defendants argue that Donahue cannot satisfy this prong of the standing inquiry because § 58A prevents any individual, regardless of their race, from receiving an original appointment to the BPD based on an exam taken after that individual's thirty-second birthday.

Defendants allege that, even assuming Donahue's score of 100 on the April 2001 exam is so high as to guarantee that, all other issues aside, he would have been hired by the BPD, because Donahue was thirty-two when he took that exam he cannot be considered. Donahue is, according to Defendants, not able and ready to become a police officer with the BPD, because of § 58A's age limitation. Defendants, therefore, conclude that, as § 58A is a valid and constitutionally sound statute, Donahue has no standing to pursue his claim for prospective relief and Defendants' motion for summary judgment should be allowed. For his part, Donahue counters that § 58A (1) has been repealed; (2) does not apply to him because he is not seeking an "original appointment;" and (3) is unconstitutional. n48

A. § 58A Remains in Effect.

The Legislature of the Commonwealth of Massachusetts passed § 58A on August 10, 2000. Section 58A states:

Notwithstanding the provisions of any general or special law to the contrary, in any city, town or district that accepts this section, no person shall be eligible to have his name certified for original appointment to the position of firefighter or police officer if such person has reached his thirty-second birthday on the date of his entrance examination.

Each city, town or district was thus able to determine for itself whether it wished to exclude applicants age thirty-two and over from the certification list from which police officers and firefighters are hired. The City of Boston elected to adopt § 58A, and notified the

Commonwealth of its decision to do so on January 23, 2001. n49

Donahue argues that, despite the City of Boston's adoption of § 58A, the section does not apply to the April 2001 examination because the City Council passed a home rule petition exempting "any Boston resident who took and passed the April 2001 civil service examination for appointment to the position of police officer with the Boston Police Department . . . ." n50 But, the home rule petition was never presented to, nor enacted by, the Legislature, because Boston's Mayor Tom Menino never approved it. n51 There being no evidence to the contrary, this court is satisfied that § 58A remains in force in the City of Boston and Donahue cannot avail himself of any exemption from its operation.

Nor does § 58A run afoul of the Constitution of the Commonwealth of Massachusetts' prohibition against passing special laws that would circumvent standing laws of general application. n52 Article 10 provides that "each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws," n53 and thereby "prohibits the enactment of special legislation that singles out any person for special privileges or advantages at the expense of the rights of another." n54 The courts have defined "special legislation" as "legislation addressed to a particular situation, that does not establish a rule of future conduct with any substantial degree of generality, and may provide ad hoc benefits of some kind for an individual or a number of them." n55

In reviewing a legislative enactment, the court must grant all rational presumptions in favor of its constitutionality. n56 The question is not whether this court deems the legislation wise, but rather whether the statute falls within the Legislature's power to enact. n57 In fact, "the party challenging the statute's constitutionality must demonstrate beyond a reasonable doubt that there are no conceivable grounds which could support its validity." n58 Donahue cannot meet his heavy burden of establishing that § 58A violates the Constitution of the Commonwealth of Massachusetts. Quite simply, § 58A is not "special legislation" because it does "establish a rule of future conduct with [a] substantial degree of generality" and is not aimed at benefitting a specific group. Section 58A applies equally to all applicants to the Boston Police and Fire Departments who took the civil service exam after § 58A's enactment and after they received notice of the § 58A age limitation. Section 58A, furthermore, serves a public purpose by ensuring that new officers are able to make a long-term commitment to the BPD and are physically capable of performing their duties, and by benefitting the pension system. n59

Donahue has similarly failed to establish that § 58A and the home rule petition to exempt candidates who took the April 2001 police officer exam violate Chapter 4 § 4B of the Massachusetts General Laws ("§ 4B") and Amended Article 2 to the Massachusetts Constitution. Donahue is correct that both § 4B and Amended Article 2 define the authority of cities, towns and municipalities to govern themselves. Donahue appears to argue that the City Council exceeded its authority in its effort to modify § 58A by the home rule petitions passed on behalf of candidates seeking appointment as

police officers or firefighters. n60 This evinces, however, a misunderstanding of the City Council's actions with respect to the two home rule petitions. The City Council asked the Legislature to amend § 58A to exempt, first, those firefighter candidates who had taken the April 2000 civil service exam prior to § 58A's enactment and, second, those police officer candidates who had taken the April 2001 civil service exam after § 58A's enactment. The Legislature voted to amend § 58A to exempt the firefighter candidates who had taken the April 2000 exam after that home rule petition was approved by Mayor Menino. On the other hand, Mayor Menino did not approve the home rule petition with respect to the police officer candidates who had taken the April 2001 exam and thus the Legislature was never presented with, and never enacted, any such amendment to § 58A. The City Council, therefore, took no action to rescind or amend § 58A at all, let alone any action that violated either § 4B or Amended Article 2. Because § 58A's age limitation remains in its original form as to police officer candidates who took the April 2001 exam, this court now turns to Donahue's second argument--that § 58A does not apply to him.

B. Donahue Seeks an Original Appointment.

Donahue's second attack is not on § 58A itself but on its applicability to his appointment to the BPD. Donahue asserts that § 58A's age limitation does not apply to him because he is not seeking an "original appointment." n61 As support for this argument, Donahue points to the fact that he is a police officer with the Town of Yarmouth, and that prior to that he was a police officer with the University of Massachusetts.

Mass. Gen. Laws ch. 31 § 6 states:

Each appointment to a civil service position shall be made by an original appointment pursuant to the provisions of this section or by a promotional appointment pursuant to the provisions of section seven, except as otherwise provided by this chapter or other law. Each such original appointment in the official service shall be made after certification from an eligible list established as the result of a competitive examination . . . .

It thus appears that there only five ways in which Donahue could have been appointed to the BPD: (1) through an original appointment; (2) through a promotional appointment; (3) through the police cadet program; (4) if he was a former member of the BPD who retired because of disability and was seeking reinstatement; and (5) if he was a former recruit officer from a previous class. There is no dispute as to the latter three options with regard to Donahue--he was neither a cadet nor a former member of the BPD nor a former recruit officer from a previous class. Donahue, therefore, could have been appointed to the BPD only through an original or a promotional appointment.

Donahue argues that his experience as a police officer in the Town of Yarmouth and with the University of Massachusetts takes him out of the category of an original appointment. In contrast, Defendants argue that, because Donahue was not appointed to those other positions through a process requiring a competitive examination, Donahue's appointment to the BPD is indeed an original appointment. Defendants' argument is essentially this: because neither position

required a competitive exam, neither position qualifies as a civil service position. Since Donahue was never employed in a civil service position, his appointment to the BPD would be an original appointment, and thus subject to § 58A's age limitation.

There can be no doubt but that were Donahue appointed to the BPD, it would be an original appointment. Neither his position with the Town of Yarmouth police department nor his position with the University of Massachusetts can be considered a civil service position, because neither was pursuant to a competitive exam. "Civil service appointment" is statutorily defined to include either "an original appointment or a promotional appointment made pursuant to the provisions of the civil service law and rules." n62 The courts have held that "an underpinning of the civil service structure is that original and promotional appointments will be made from a list of persons declared eligible on the basis of competitive examination." n63 It is undisputed that neither the position with the Town of Yarmouth nor the position with the University of Massachusetts required Donahue to take a competitive examination as a condition of being hired. Donahue has thus not been employed in a civil service position.

It is equally clear from the statute that promotional appointments require that the candidate already be employed in a civil service position. A police officer can achieve a promotional appointment pursuant to Mass. Gen. Laws ch. 31 § 59. That section states that the examination for a promotional appointment is open only to a permanent employee, defined as "a person who is employed in a civil service position (1) following an

original appointment . . . ; or (2) a promotional appointment . . . ." n64 To be eligible for a promotional appointment, therefore, Donahue would have had to have been in a civil service position when he took the exam to join the BPD. n65 Since his prior employment as a police officer had never required Donahue to take a competitive exam, that prior employment does not qualify as civil service employment, and Donahue was eligible to join the BPD only via an original appointment. That being so, § 58A's age limitation prevents Donahue's original appointment unless his third argument, that § 58A is unconstitutional, requires this court to find otherwise.

C. Section 58A is Constitutional.

Donahue's third and final attack on § 58A is that it violates an individual's constitutional right to equal protection. n66 There is no question that § 58A classifies applicants to the BPD on the basis of age, and treats those under the age of thirty-two on the day of the exam differently than those age thirty-two and older. But it is also well-settled law that "States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest." n67 An age classification is rationally related "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the legislature's actions were irrational." n68 It is irrelevant that reliance on age as a proxy for other characteristics, like fitness, may be misplaced or inaccurate. n69 Finally, because an age classification is presumptively rational, "the burden of

proving that the facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker" rests with the party challenging its constitutionality. n70

Donahue has not met his burden of convincing this court that § 58A is not rationally related to a legitimate state interest. In his sworn affidavit, Edward P. Callahan, Director of Human Resources for the BPD, states that the BPD, in supporting the City Council's decision to adopt § 58A, believed that the age limitation ensured that new police officers were making a long-term commitment to the BPD. n71 The age limitation further served to ensure that police officers with the BPD were physically capable of performing their duties. n72 Finally, the age limitation would benefit the BPD'S pension system. n73 It does not matter whether these were the reasons on which the City Council actually relied in deciding to adopt § 58A. It matters only whether these reasons evince a legitimate public purpose that is rationally related to § 58A's age limitation. This court believes that § 58A is rationally related to a number of legitimate public purposes, including encouraging a long-term commitment to the BPD, ensuring the physical fitness of its officers, and relieving strain on the BPD's pension system. In short, § 58A is rationally related to a legitimate public purpose, and thus survives constitutional scrutiny.

Donahue's argument that § 58A should meet the requirements of strict scrutiny analysis because it is in fact a statute that has the effect of classifying individuals based on their race has no merit. Donahue argues that because minorities do not need to score as

high as non-minorities on the test, minorities who scored as well or better than Donahue on exams prior to April 2001 all have jobs with the BPD already. n74 Those individuals are thus not affected by § 58A's age limitation. Section 58A, according to Donahue, thus has a disparate impact on non-minorities competing for a position with the BPD. n75

Strict scrutiny is not required, however, because this facially neutral statute affects minorities and non-minorities age thirty-two and over in exactly the same way. Any individual, regardless of his race, seeking an original appointment to the BPD is precluded from doing so if he is thirty-two or older on the day he presents himself for the civil service exam. Even if this court were to accept Donahue's largely speculative assertion that § 58A has a disparate impact on non-minorities, there is no evidence that § 58A's age classification is a pretext for racial discrimination or that the Legislature had a discriminatory purpose in enacting § 58A. n76 There is thus no need to apply strict scrutiny analysis to § 58A, and since there exists a rational basis for the age classification, § 58A is constitutionally sound. n77

CONCLUSION

There is no evidence that § 58A (1) is no longer in effect; (2) does not apply to him; or (3) is unconstitutional. That being so, § 58A prevents Donahue from being appointed to the BPD because he reached age thirty-two before taking the April 2001 civil service exam. Donahue is thus not able and ready to apply for appointment to the BPD, not because of the consent decree, but because he is too old. In other

words, Donahue has not established that he has the requisite standing to pursue his claim for prospective relief, and his suit must be dismissed. Defendants' motion for summary judgment is ALLOWED.

AN ORDER WILL ISSUE.

/S/ Joseph L. Tauro

United States District Judge

Footnotes

n1 Other named defendants are Paul F. Evans, Commissioner of the BPD; James J. Hartnett, Personnel Administrator of the Commonwealth of Massachusetts Executive Office for Administration and Finance, Human Resources Division; James P. McDonagh, Assistant Personnel Administrator of the Human Resources Division; Marc Charvanne, Director of Test Administration of the Human Resources Division; and John Marra, General Counsel of the Human Resources Division.

n2 365 F. Supp. 655 (D. Mass 1973) (Wyzanksi, J.).

n3 See Donahue v. City of Boston, 183 F. Supp. 2d 202 (D. Mass. 2001) (Tauro, J.).

n4 See Donahue v. City of Boston, 304 F.3d 110, 116 (1<st> Cir. 2002).

n5 See id. at 119-20.

n6 See Aff. of Irene C. Freidel in Supp. of Mot. to Dismiss and for Summ. J. on all Counts of Second Am. Compl. ("Freidel Aff.") Ex. D ("Donahue Depo.") at 18.

n7 See Donahue Depo. at 17.

n8 See Aff. of Omar Hernandez, Deputy General Counsel, Mass. Human Resources Div. ("Hernandez Aff.") PP 3-4.

n9 See Second Am. Compl. P 12.

n10 See MASS. GEN. LAWS ch. 31 § 1.

n11 See Second Am. Compl. P 63; Aff. of Edward P. Callahan ("Callahan Aff.") P 8.

n12 See Callahan Aff. P 9.

n13 See MASS. GEN. LAWS ch. 31 § 26.

n14 See Callahan Aff. PP 10, 13.

n15 See Callahan Aff. P 12.

n16 See Callahan Aff. P 17.

n17 See MASS. GEN. LAWS ch. 31 § 6; Callahan Aff. P 19.

n18 See Callahan Aff. P 19. Additionally, special certification lists may be created of persons who qualify for a hiring preference based on their ability to speak certain languages. See Callahan Aff. P 22.

n19 See MASS. GEN. LAWS ch. 31 § 27.

n20 See Callahan Aff. P 24.

n21 See MASS. GEN. LAWS ch. 32 § 8.

n22 See MASS. REGS. CODE tit. 550, § 3.04(1)(e); Callahan Aff. P 26.

n23 See First Am. Compl.

n24 See First Am. Compl. at 41-42.

n25 See Donahue v. City of Boston, 183 F. Supp. 2d 202 (D. Mass. 2001).

n26 Michael Want was the lowest-ranking, non-minority candidate appointed. Want's name appeared on page four of the eligible list at number 188. Donahue's name, on the other hand, appeared at number 1350, on page twenty-seven. Between Want's name and Donahue were 1172 names. Since the names alternate between minority and non-minority candidates, half the names on the eligible list are non-minorities. There were, therefore, 586 non-minority names between Want and Donahue on the eligible list, and the BPD would have had to consider 586 other non-minority candidates before Donahue for the thirteen available spots. See id. at 205-06.

n27 The lowest-ranked, non-minority candidate appointed was a veteran whose name (Richard McNeil) appeared at number ninety-one on page two of the eligible list. Donahue's name appeared at number 326 on page seven of the eligible list. Between McNeil and

Donahue were 117 non-minority candidates eligible to fill the seven available spots. See id. at 206.

n28 See Callahan Aff. P 57.

n29 See Donahue v. City of Boston, 183 F. Supp. 2d 202, 209 (D. Mass. 2001).

n30 See Donahue v. City of Boston, 304 F.3d 110, 116 (1st Cir. 2002).

n31 See id. at 121.

n32 According to HRD records, one minority applicant hired to the BPD as a result of the May 1999 civil service examination scored a 95 on that exam, whereas Donahue scored a 96. One minority candidate hired as a result of that exam scored a 96 as well, while the remaining five minority candidates hired had scores higher than that of Donahue. See Second Aff. of Edward P. Callahan ("Callahan Aff. II") P 17.

n33 Donahue v. City of Boston, 304 F.3d 110, 120 (1<st> Cir. 2002) (noting, however, that "this is not the same as evidence demonstrating that Donahue would have received an appointment under race-neutral criteria").

n34 See Second Am. Compl. P 116.

n35 See Second Am. Compl. P 117.

n36 See Memo. of the City of Boston Defs. in Supp. of Mot. for Summ. J. and/or Mot. to Dismiss the Second Am. Compl. ("Defs.' Memo.") at 8 (stating that Donahue turned thirty-two on March 26, 2001).

n37 MASS. GEN. LAWS ch. 31 § 58A.

n38 See Hernandez Aff. P 7.

n39 See Hernandez Aff. P 7.

n40 See Hernandez Aff. P 8; Callahan Aff. II Ex. A.

n41 See Hernandez Aff. P 8; Callahan Aff. II Ex. A.

n42 Although the parties make a number of arguments in their briefs, this court believes that § 58A's effect on Donahue's candidacy is the only remaining issue in the case.

n43 Fed. R. Civ. Proc. 56(c).

n44 Cadle Co. v. Hayes, 116 F.3d 957, 959 (1st Cir. 1997) (internal citations and quotations omitted).

n45 See Donahue v. City of Boston, 304 F.3d 110, 119 (1<st> Cir. 2002) (citing Wooden v. Bd. of Regents of the Univ. Sys. of Ga., 247 F.3d 1262, 1279 (11<th> Cir. 2001)).

n46 Donahue, 304 F.3d at 119 (internal citations and quotations omitted).

n47 See id. at 119-20.

n48 Donahue's assertion that the First Circuit "unequivocally resolved" that, but for his race, he would have been hired based on his score on either the April 1997 or May 1999 exams is without merit. It is true that, because a minority applicant with a lower

score on the May 1999 exam was hired while Donahue was not, the First Circuit found inescapable the conclusion that "Donahue would likely have been hired based on his May 1999 exam score if he were a minority applicant." Donahue v. City of Boston, 304 F.3d 110, 120 (1<st> Cir. 2002) (emphasis added). But, the First Circuit went on to say, in the very next sentence, "that this is not the same as evidence demonstrating that Donahue would have received an appointment under race-neutral criteria . . . ." Id. Nor could the First Circuit have concluded that, in the absence of the consent decree, Donahue would have been hired by the BPD. Donahue's score on the May 1999 exam placed him at approximately number 326 on the eligible list. All but seven spots were filled by candidates with statutory preferences or from the cadet program. For those seven spots, the BPD would have had to consider 117 candidates before it considered Donahue. Since the BPD typically hires one person for every three persons listed on an eligible list, Donahue would not have been hired even under race neutral criteria.

n49 See Freidel Aff. Ex. A; Callahan Aff. II P 7.

n50 See Freidel Aff. Ex. C.

n51 See Freidel Aff. P4; Freidel Aff. Ex. C. On the other hand, Mayor Menino did approve, and present to the Legislature, a home rule petition exempting from § 58A firefighters "who took and passed the April 29, 2000 examination for appointment to the position of firefighter with the Boston Fire Department . . . ." See Freidel Aff. P 3; Freidel Aff. Ex. B. There is some indication in the record that the Mayor passed the home rule petition as to firefighters because those applicants

had been afforded no notice of the age limitation prior to taking the April 2000 firefighter's exam. See Def.'s Memo. at 10; Freidel Aff. Ex. B. This was not the case with the exam for police officers, administered in April 2001, as the City of Boston made every effort to notify candidates when they signed up for the exam that certain towns had adopted the § 58A age limitation. See Callahan Aff. IV P 5; Callahan Aff. IV Ex. A.

n52 See Second Am. Compl. P 125.

n53 MASS. CONST. Pt. 1, Art. 10. The courts have interpreted "standing laws" to mean "enacted legislation of general application." Kienzler v. Dalkon Shield Claimants Trust, 426 Mass. 87, 686 N.E.2d 447, 450 n. 1 (Mass. 1997).

n54 Kienzler, 686 N.E.2d at 449 (internal citations and quotations omitted).

n55 Kienzler, 686 N.E.2d at 450 (quoting Comm'r of Pub. Health v. Bessie M. Burke Mem'l Hosp., 366 Mass. 734, 323 N.E.2d 309, 313 (Mass. 1975)).

n56 See Kienzler, 686 N.E.2d at 449-50 (citing Paddock v. Brookline, 347 Mass. 230, 197 N.E.2d 321, 323 (Mass. 1964)).

n57 See Kienzler, 686 N.E.2d at 450.

n58 Id. (internal citations and quotations omitted).

n59 See Kienzler, 686 N.E.2d at 450 (noting that the primary vice of legislation struck down as inconsistent with Article 10 "was the fact that [it] served no

discernable public purpose and operated only to aggrandize the personal interests of a single party"); Callahan Aff. IV P 3.

n60 Donahue also argues that the City of Boston was without authority to adopt § 58A because § 58A violates the equal protection guarantees of the federal Constitution. This argument is considered, and rejected, below.

n61 By its terms, § 58A acts as a bar only to those candidates age thirty-two and over who are seeking an original appointment to the BPD. MASS. GEN. LAWS ch. 31 § 58A.

n62 MASS. GEN. LAWS ch. 31 § 1.

n63 , City of Fall River v. Teamsters Union, Local 52627 Mass. App. Ct. 649, 541 N.E.2d 1015, 1017 (Mass. App. Ct. 1989); see also Aquino v. Civil Serv. Comm'n, 34 Mass. App. Ct. 538, 613 N.E.2d 131, 132 (Mass. App. Ct. 1993) ("Original and promotional appointments under the civil service system are made from a list of persons who have met the requirements for eligibility."); City of Somerville v. Somerville Mun. Employees Ass'n, 20 Mass. App. Ct. 594, 481 N.E.2d 1176, 1180 (Mass. App. Ct. 1985) (finding that original appointment required certification from an eligible list established as a result of a competitive examination). Promotional appointments in the BPD also require a competitive promotional exam. See MASS. GEN. LAWS ch. 31 § 59.

n64 MASS. GEN. LAWS ch. 31 § 1.

n65 This court assumes, purely for the sake of argument, that the civil service exam Donahue took is the same exam as a candidate for a promotional appointment would take. Although this seems unlikely in reality, it does not matter because Donahue was not eligible for a promotional appointment in the first place.

n66 U.S. Const. amend. XIV, § 1.

n67 Kimel v. Florida Bd. of Regents, 528 U.S. 62, 83, 145 L. Ed. 2d 522, 120 S. Ct. 631 (2000).

n68 Vance v. Bradley, 440 U.S. 93, 97, 59 L. Ed. 2d 171, 99 S. Ct. 939 (1979); Kimel, 528 U.S. at 84.

n69 See Kimel, 528 U.S. at 84; Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 316, 49 L. Ed. 2d 520, 96 S. Ct. 2562 (1976).

n70 See Kimel, 528 U.S. 62, 145 L. Ed. 2d 522, 120 S. Ct. 631 (internal citations and quotations omitted).

n71 See Callahan Aff. IV P 3.

n72 See Callahan Aff. IV P 3.

n73 See Callahan Aff. IV P 3.

n74 See Memo. in Supp. of Pl.'s Cross-Mot. for Summ. J. and Opp'n to Defs.' Mot. to Dismiss Second Am. Compl. and/or for Summ. J. ("Pl.'s Memo.") at 18.

n75 See Pl.'s Memo. at 18.

n76 See Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 272, 60 L. Ed. 2d 870, 99 S. Ct. 2282 (1979) (stating that although disparate impact is a starting point for the analysis, it is purposeful discrimination that offends the Constitution); Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-65, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977) (stating that "proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause").

n77 Similar age classification statutes have been upheld in other jurisdictions. See, e.g., Stewart v. Smith, 218 U.S. App. D.C. 94, 673 F.2d 485 (D.C. Cir. 1982) (noting in a footnote that the Bureau of Prisons' age limit of thirty-four for new hires was not an irrational means to maintaining a vigorous law enforcement workforce); Thomas v. United States Postal Inspection Serv., 647 F.2d 1035 (10<th> Cir. 1981) (finding that age maximum of thirty-four was rationally related to the continuous need for young, strong and experienced postal inspectors); Arritt v. Grisell, 567 F.2d 1267 (4<th> Cir. 1977) (finding that age maximum of thirty-five established for police officer candidates was rationally related to a legitimate purpose); Ridaught v. Div. of Florida Highway Patrol, 314 So. 2d 140 (Fla. 1975) (upholding requirement that all applicants be less than age thirty-five as reasonably relevant to the State's purpose of ensuring sufficiently agile, alert and dexterous highway patrol officers); Figueroa v. Bronstein, 38 N.Y.2d 533, 344 N.E.2d 402, 381 N.Y.S.2d 470 (N.Y. 1976) (finding age maximum of thirty-two for appointment as a correction officer constitutional); Sobieralski v. City of S. Bend, 479 N.E.2d 98 (Ind. Ct. App. 1985) (upholding age maximum of thirty-six for

new police officers as rationally related to a legitimate state interest); Peterson v. City of New York, 1998 U.S. Dist. LEXIS 7082, 1998 WL 247530 (S.D.N.Y. May 14, 1998) (finding that case law upholding age limit of twenty-nine for new police officers has precedential value even though statute establishing age limit had been amended).

Civil Action No. 00-10884-JLT

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRADLEY J. DONAHUE,
Plaintiff,

v.

CITY OF BOSTON, et al.,
Defendants.

ORDER

December 10, 2002

TAURO, J.,

The court hereby orders as follows:

(1) Plaintiff's Motion to Amend the First Amended Complaint [#124] is ALLOWED;

(2) Plaintiff shall submit a Second Amended Complaint by December 31, 2002;

(3) Defendant shall file a Motion for Summary Judgment on the issues of the constitutionality and applicability of Mass. Acts. Ch. 242 (codified at Mass. Gen. Laws. C. 31, §58A) by January 31, 2003;

(4) Plaintiff shall submit his opposition and proposed form of transfer to the Massachusetts Supreme Judicial Court by February 28, 2002;

IT IS SO ORDERED.

/s/

United States District Judge

The following are some of the written representation made by the Defendants to the United States District Court (D. Mass) and the First Circuit Court of Appeal, which essentially state that everyone else who was hired (during the relevant period when Petitioner was not hired) had a higher score or a statutory preference. This position was taken both before and after the time that the City said it became aware of the scores, and was subsequently rejected by the First Circuit in Donahue I:

1. "Donahue was not appointed because hundreds of other eligible applicants for the limited number of available positions scored higher than Donahue, had race-neutral preferences, or both."

City Defendants' Appeals Brief to the First Circuit April 22, 2002, p. 19) (hereafter, "City's Appeal Brief" in Donahue I)

2. "The undisputed facts show that the City would never have hired Donahue regardless of his race, because his test scores were not high enough to be competitive and he did not have a 'statutory preference'".

City's Appeal Brief, p. 1 in Donahue I.

3. "The City would never have hired Petitioner regardless of his race because Petitioner's entrance examination was not high enough to be competitive and he did not have any so-called statutory preference..."

Defendants' Motion for Protective Order, July 13, 2001, p. 3.

4. "None of the City Defendants are involved in the preparation of the certification lists for hiring and, in any event, the Petitioner's test score was not sufficiently high to render Petitioner competitive."

Defendants' Motion for Protective Order, p. 2.

5. "As Edward Callahan testified, Petitioner would never have been hired from the general eligibility list because his entrance examination was not high enough."

Defendants' Motion for Protective Order, p. 5.

6. "Thus Donahue had no chance of being hired ... regardless of the consent decree."

City's Appeal Brief, p. 12, in Donahue I.

7. "In Donahue's case, his test scores and lack of statutory preference rendered him non-competitive at the outset of the hiring process ... Thus the viability of Donahue's application was never affected by Donahue's race."

City's Appeal Brief, p. 22, in Donahue I.

8. "The City is not aware of whether minority candidates with lower test scores than Donahue were hired by virtue of the Consent Decree."

Defendants' Memorandum in Support of Motion for Summary Judgment, May 30, 2001, p. 7.

9. "... Donahue's noncompetitive test score and lack of statutory preference, and not his race, kept him from competing equally with other applicants ... Donahue's score places him so far below the ("2n+1") civil service rule cutoff point that any chance of his appointment was foreclosed without reference to his race."

Defendants' Memorandum in Support of Motion for Summary Judgment, May 30, 2001, p. 18.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution: Fourteenth Amendment

Fourteenth Amendment - Rights Guaranteed Privileges and Immunities of Citizenship, Due Process and Equal Protection

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 42 > CHAPTER 21 > SUBCHAPTER I > Sec. 1983.

Sec. 1983. - Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any

action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia

TITLE 42 > CHAPTER 21 > SUBCHAPTER I > Sec. 1988.

Sec. 1988. - Proceedings in vindication of civil rights

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 (20 U.S.C. 1681 et seq.), the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.), the Religious Land Use and Institutionalized Persons Act of 2000 (42 U.S.C. 2000cc et seq.), title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

TITLE 42 > CHAPTER 21 > SUBCHAPTER VI > Sec. 2000e-2.

Sec. 2000e-2. - Unlawful employment practices

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

TITLE 42 > CHAPTER 21 > SUBCHAPTER VI > Sec. 2000e-5.

Sec. 2000e-5. - Enforcement provisions

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(2)
(B)
On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court –

(i)
may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

M.G.L. CHAPTER 151B. UNLAWFUL DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGIOUS CREED, NATIONAL ORIGIN, ANCESTRY OR SEX

Chapter 151B: Section 4 Unlawful practices

Section 4. It shall be an unlawful practice:

For an employer, by himself or his agent, because of the race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, genetic information, or ancestry of any individual to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

M.G.L. CHAPTER 31. CIVIL SERVICE

Chapter 31: Section 58A Municipal police officers and firefighters; maximum age restrictions

Section 58A. Notwithstanding the provisions of any general or special law to the contrary, in any city, town or district that accepts this section, no person shall be eligible to have his name certified for original appointment to the position of firefighter or police officer if such person has reached his thirty-second birthday on the date of the entrance examination. Any veteran shall be allowed to exceed the maximum age provision of this section by the number of years served on active military duty, but in no case shall said candidate for appointment be credited more than four years of active military duty.

FEDERAL RULES OF CIVIL PROCEDURE

III. Pleadings and Motions

Rule 15-- Amended and Supplemental Pleadings

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when

justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.